Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

GEORGE HILL,

Petitioner,

-versus-

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; AVONDALE SHIPYARDS, INCORPORATED, self-insured employer,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Did the Court of Appeals deprive a disabled shipyard worker of his constitutional rights by fundamentally changing the rule regarding the tolling of the one-year statute of limitations period found in the Longshore and Harbor Workers Compensation Act ("LHWCA")?

(2) Should this Honorable Court permit the Court of Appeals to superimpose a state statute of limitations on the uniform one-year, LHWCA statute of limitations?

(3) Should a disabled shipyard worker ever be denied benefits under the LHWCA when he timely files a claim (albeit a state claim) under the LHWCA?

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I

OPINIONS BELOW

The published decision of the United States Court of Appeals for the Fifth Circuit is set forth in the Appendix, p. 1a and is reported at 195 F.3d 790. The published decision of the Benefits Review Board dated August 4, 1998 is set forth in the Appendix, p. 10a and is unreported. The unpublished decision of the Administrative Law Judge dated February 27, 1998 is set forth in the Appendix, p. 21a and is unreported.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Fifth Circuit issued its Decision in this case on November 10, 1999. This Petition was filed within 90 days of the issuance of said Decision, and is thus timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Longshore and Harbor Worker's Compensation Act ("LHWCA"), 33 U.S.C. Section 901 *et. seq.*

Section 913(d) provides:

> Where recovery is denied to any person, in a suit brought at law or in admiralty to recover

> damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit. 33 U.S.C. 13(d).

STATEMENT OF THE CASE

On October 1, 1980, George Hill (hereinafter referred to as "Petitioner") was in the course and scope of his employment as a sandblaster for Avondale Shipyards, Inc. ("Avondale") when he injured his back in an occupational accident. Petitioner became aware of the full magnitude of his back injury on August 23, 1983. Petitioner filed his state workers' compensation claim against Avondale on February 21, 1984, approximately six months after his date of awareness, August 23, 1983.

On June 24, 1992, while the state workers' compensation claim was still pending, the instant claim under the LHWCA was filed. The state workers' compensation claim was ultimately dismissed as being perempted under Louisiana law.

After trial, the Administrative Law Judge ("ALJ") found that while Petitioner had proven his entitlement to

benefits, he had not filed his claim timely under the LHWCA. Therefore, the ALJ awarded only medical benefits to Mr. Hill, which are never time- barred. The ALJ's decision was affirmed by the Benefits Review Board ("BRB") on August 4, 1998 and by the United States Court of Appeals for the Fifth Circuit on November 10, 1999.

ARGUMENT

I. THE COURT OF APPEALS DEPRIVED MR. HILL OF HIS CONSTITUTIONAL RIGHTS BY RETROACTIVELY CHANGING IT S APPLICATION OF THE LAW.

In 1984, a shipyard worker (like Mr. Hill) had the option of filing a claim for an occupational injury in either the state workers' compensation system or the federal plan set forth under the LHWCA.

Mr. Hill first filed a state workers' compensation claim for his back injury. He filed his state claim within the one year statute of limitations period set forth in the LHWCA, and believed in good faith that this claim was also timely under state law. Importantly, Mr. Hill's state claim sought the same benefits from the same employer for the same injury as if he had filed a claim under the LHWCA.

In 1992, While his state claim was still pending, Mr. Hill filed a claim under the LHWCA. Mr. Hill fell back on the federal system because a question had arisen whether his

state claim was barred by a two-year peremptive statute.[1] The LHWCA did not have such a statute, and there is no dispute that the state workers' compensation claim, filed on February 21, 1984, was timely under the LHWCA.

Mr. Hill's LHWCA claim was timely filed on June 24, 1992. 33 U.S.C. 13(d) provides a tolling mechanism for the LHWCA's one year limitations period. 33 U.S.C. 13(d) provides:

> Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

33 U.S.C. 13(d).

---

[1] This statute provided that an injured worker had to file a Louisiana workers' compensation claim within two years of the date of the injury, regardless of whether the individual was disabled. Thus, Mr. Hill was required to file his state claim by October 1, 1982, despite the fact he was not aware of the full extent of his injury until August 23, 1983.

Thus, Mr. Hill believed his pending state workers' compensation claim tolled the one year period.

Supporting his belief was the well established jurisprudence. In 1978, the Fifth Circuit held that a state compensation claim tolls the one-year statute of limitations found under Section 13(d). *Ingalls Shipbuilding Division, Litton Systems, Inc. v. Hollinhead,* 571 F.2d 272 (5th Cir. 1978). Petitioner further relied on the BRB's application of Section 13(d). In *Calloway v. Zigler Shipyards, Inc.,* 16 BRBS 175, 177 (1984), the Benefits Review Board, citing *Hollinhead,* held that "the grounds upon which recovery in the claim for damages is denied are irrelevant because it is the filing of the action which tolls the time limits." (emphasis added).

Because there was clear precedent holding that a state workers' compensation claim triggered the tolling provision of Section 13(d) and because the reason for denial of that state claim is not to be considered under the LHWCA, Mr. Hill properly fell back on the protection of the uniform federal compensation scheme and filed a claim under the LHWCA. Petitioner relied on the law which indicated that as long as he filed his state claim within the one year federal statute of limitations, he could seek his federal remedy at anytime during the pendency of his state claim. Thus, there was no attempt by Mr. Hill to subvert the purposes of the statute of limitations as the Fifth Circuit suggests. *Hill v. Director, 195* F.3d 790, 794 (5th Cir. 1999).

The Fifth Circuit violated Mr. Hill's due process and constitutional rights by fundamentally changing the law. The Fifth Circuit incorrectly held that *Ingalls* and *Calloway* were distinguishable. The Court of Appeals erroneously concluded that the issue whether an untimely state claim is an adequate ground for applying the tolling provision was never addressed, and that both of those cases were timely under the applicable state law. *Hill* at 793.

The lower court's re-interpretation of earlier precedent profoundly altered the law regarding the filing of LHWCA claims and thereby severely prejudiced Mr. Hill. For example, before the Court of Appeals' decision, there is no dispute that Mr. Hill had until August 23, 1984, one year from the date of his full awareness of his injury, to file a LHWCA claim. There is no dispute that the state claim was filed before August 23, 1984. Nevertheless, the Fifth Circuit held that Mr. Hill must have filed his state claim by October 1, 1982 in order to toll the LHWCA.

This is an absurd result. Because the state claim was timely under the LHWCA, the claim certainly tolled the LHWCA's one year period under 33 U.S.C. 9 13(d). The Court of Appeals improperly superimposed the state-law statute of limitations in applying the federal tolling statute.

Moreover, the Fifth Circuit's ruling flies in the face of the well established principle that the LHWCA must be liberally construed in conformity with its remedial and humanitarian purpose. *Hollinhead* at 274, citing *Voris v. Eikel,* 346 U.S. 328 at 333 (1953). The Fifth Circuit's holding

contemplates a strict construction of Section 13(d). In effect the Court has read into Section 13(d) a provision that if the applicable state workers' compensation scheme provides a shorter time limitation for filing a claim than the LHWCA does, then the shorter period controls the LHWCA statute of limitations.

This approach will lead to harsh and incongruous results. For example, the applicable statute of limitations and viability of a LHWCA claim would depend upon the state in which the shipyard is located. Wildly different state laws on limitation would affect the application of the federal tolling statute. Clearly, this would not serve the federal interest of protecting injured harbor workers and employers with a national uniform compensation system. A fundamental part of this national system is the disabled worker's ability to rely on a standard one year statute of limitation and tolling provision.

Similarly, the harsh results are illustrated in the instant case. Mr. Hill, an injured shipyard worker with a meritorious case, is denied compensation because of technical state restrictions read into Section 13(d). This violates Petitioner's due process rights and flies in the face of the humanitarian purpose of the LHWCA. In *Hollinhead* the Fifth Circuit held that the Act should not be interpreted as to enable the employer to escape liability for persons entitled to recover for a compensable injury by reading into it technical restrictions on the tolling of the filing period which are inconsistent with the purpose of the LHWCA. *Hollinhead* at

274, citing *Blackwell Construction Co. v. Garrell,* 352 F.Supp. 192 at 196 (1972).

Furthermore, the Fifth Circuit's finding that Avondale would be prejudiced is unfounded. Avondale presented no evidence in this regard. Generally, an appellate court cannot make factual conclusions, and certainly cannot do so regarding evidence that was never offered before the trier of fact. *Brown v. I. T. T./Continental Baking Co.,* 921 F.2d 289 (D.C. Cir. 1990). Regardless, Avondale has not been prejudiced but has instead enjoyed the use of approximately sixteen years of moneys which should have gone to pay benefits to Petitioner, but for technical defenses impeding a meritorious claim. Avondale's only defense to the state claim was the technical two year peremptive bar, and its only defense to the instant claim is similarly based on a "technical restriction". *Hollinhead* at 274. Additionally, Avondale was afforded an opportunity to investigate the claim as it was on notice of claimant's injury in October 1980. In fact, presumably pursuant to an initial investigation, Avondale paid Petitioner disability benefits through November 1980 and had him treated by on-facility physicians.

CONCLUSION

In conclusion, this Honorable Court should grant certiorari to review this important matter. The LHWCA is designed in favor of the injured worker. Rules have been promulgated to carry out this end. Section 13(d) mandates that if Petitioner filed a state workers' compensation claim, it

tolls the LHWCA statute of limitations. He relied on this fact. The lower courts are now changing the rules in midstream by saying that the applicability of Section 13(d) is dependent on the state statute of limitations and the timeliness of the state workers' compensation claim, even though the claim would have been timely under the presumed nationally uniform LHWCA one year statute of limitations. Petitioner is owed a lifetime of benefits and is being denied same on an erroneous technicality in violation of his due process rights.

Respectfully submitted,
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(Any footnotes trail end of each document)

No. 98-60606

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEORGE HILL,
Claimant-Petitioner,

VERSUS

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS; U. S. DEPARTMENT OF LABOR; and AVONDALE SHIPYARDS, INCORPORATED,
self-insured employer,
Respondents.

November 10, 1999, Decided

COUNSEL:

For GEORGE HILL, Claimant - Petitioner: James F Scott, III, Gretna, LA. Rodney Paul Vincent, Gertler, Gertler, Vincent & Plotkin, New Orleans.

For DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR, Respondent: Thomas O Shepherd, Jr, Benefits Review Board, Washington, DC. Carol A De Deo, US Department of Labor, Dir, Office of Workers Comp Programs, Washington, DC. Chris J Gleasman, US

Department of Labor, Employment Standards Administration, New Orleans, LA. Andrew David Auerbach, US Department of Labor, Office of the Solicitor, Washington, DC. For AVONDALE SHIPYARDS, INCORPORATED, Respondent: Elizabeth Slatten Healy, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, LA. Joseph J Lowenthal, Jr, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, LA.

JUDGES:
Before POLITZ, DeMOSS, and BENAVIDES, Circuit Judges.

OPINIONBY:
DEMOSS

OPINION:

DeMOSS, Circuit Judge:

George Hill appeals the Benefits Review Board's ("Board") affirmance of the Administrative Law Judge's ("ALJ") decision that Hill's disability benefits claim was untimely under § 913 of the Longshore Harbor Workers' Compensation Act ("LHWCA" or "Act"), *33 U.S.C. § § 901*-50. Hill further appeals the reduction in attorneys' fees and costs. For the reasons stated below, we affirm.

I.

On October 1, 1980, Hill injured his back while working for Avondale Shipyards, Inc. ("Avondale"). After a week of disability leave, Hill returned to his sandblasting job until mid-November 1980, when Avondale transferred him to a

position in crane hooking. Hill continued to work in that capacity until he was laid off in March 1983.

On August 1, 1983, Hill experienced back pain and entered a hospital emergency room. He was referred to Dr. Robert Fleming, who evaluated him on August 23, 1983. Fleming informed Hill that he had two bulging discs and would need surgery.

Hill subsequently petitioned fdor state workers' compensation benefits on February 21, 1984. The Louisiana district court dismissed Hill's suit as being statutorily time-barred under the Louisiana Workers' Compensation Statute[1] because he filed for benefits over three years after the date of the accident. Hill appealed the decision, but the Louisiana Fifth Circuit Court of Appeals affirmed on February 25, 1992, and the Louisiana Supreme Court denied certiorari and/or review on October 2, 1992. Hill's application for reconsideration was further denied on November 6, 1992.

During the pendency of this state claim, Hill filed a claim for compensation under the LHWCA on June 24, 1992. The ALJ concluded that Hill became aware, or by the exercise of reasonable diligence should have been aware, of the relationship between his back injury and his job with Avondale on August 23, 1983, the date of Dr. Fleming's consultation. As a result, that date triggered the one-year limitations period to file a claim under § 913(a) of the LHWCA.[2] In Hill's case, the one-year limitations period would have terminated by August 23, 1984, seven and a half years before Hill ever filed his LHWCA claim. Section 913(d) provides a tolling exception to § 913(a), but the ALJ found that Hill's claim did not warrant the benefits of that provision.[3] Among other things, the ALJ concluded that it

was illogical for an untimely state claim to suspend the statute of limitations for a LHWCA claim that was also untimely filed. Lastly, the ALJ reduced the amount of attorneys' fees and costs requested by Hill's counsel.

The Board affirmed, agreeing with the ALJ that a claim filed in an untimely manner under a state compensation law cannot toll the statute of limitations for filing a claim under the LHWCA. In addition, the Board affirmed the ALJ's reduction of fees and costs, but modified it to include a sum for preparing the fee petition. This appeal ensued.

II.

We evaluate an order of the Board for errors of law and to ensure that the Board reviewed the ALJ's findings of fact for substantial evidence. *See Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884, 886 (5th Cir. 1997).* Substantial [**5] evidence is relevant evidence that is more than a scintilla but less than a preponderance. *See Director, OWCP v. Ingalls Shipbuilding, Inc., 125 F.3d 303, 305 (5th Cir. 1997).* When reviewing the findings of fact, we may not substitute our judgment of the facts for that of the ALJ or reweigh or reappraise the evidence. *See Louis Dreyfus, 125 F.3d at 886.*

Hill first challenges the Board's and the ALJ's determination that an untimely state claim does not toll a LHWCA claim's statute of limitations. To bolster his argument, he maintains that the Board improperly ignored our holding in *Ingalls Shipbuilding Div., Litton Sys., Inc. v. Hollinhead, 571 F.2d 272 (5th Cir. 1978),* and the Board's own decision in *Calloway v. Zigler Shipyards, Inc., 16 B.R.B.S. 175 (1984).*

In *Hollinhead*, we confronted a Mississippi claimant who initially filed a state claim for benefits less than seven months after his injury. He later withdrew the claim and submitted another one under the LHWCA over thirteen months after the injury. Although the LHWCA claim was time-barred under § 913(a), the ALJ found that the claimant's filing and processing of his state claim was an adequate excuse under § 913(d) to toll the statute of limitations. We ultimately affirmed the ALJ's decision and annexed relevant portions of the ALJ's conclusions of law to our opinion. *See Hollinhead, 571 F.2d at 273-75.* Unlike the present case, however, *Hollinhead* did not address the issue of whether an untimely state claim is an adequate ground for applying the tolling provision. Indeed, the precise question presented in *Hollinhead* was whether a state claim for workers' compensation qualified as a suit brought at law or in admiralty to recover damages as required under § 913(d).[4] See *Hollinhead, 571 F.2d at 273.*

In *Calloway*, several survivors of a man killed in a barge explosion initially filed a suit in admiralty, alleging that they were entitled to damages under the Jones Act. The district court ultimately dismissed the suit when it found that the employer (Zigler) was not the owner pro hac vice of the barge and that the decedent was not a seaman under the Jones Act. While the admiralty suit was pending and some thirteen months after the employee's death, the survivors filed a claim under the LHWCA. Despite that claim being time-barred under § 913(a), the ALJ ruled that the survivors' claim fell within the tolling provision of § 913(d) and approved portions of the claim. On appeal, the Board rejected the

employer's argument that § 913(d) did not apply because the admiralty suit was not dismissed for the reasons explicitly stated in § 913(d), i.e., because the decedent was an employee and Zigler was an employer under the Act and because Zigler secured compensation for the decedent. The Board concluded that the grounds, upon which recovery is denied in a suit brought at law or in admiralty, are irrelevant for purposes of § 913(d).

Notwithstanding this ruling, we readily distinguish the propriety of extending the tolling provision to the claimants in *Calloway* from the case at hand. Contrary to Hill, the *Calloway* plaintiffs' first attempt to receive benefits, via the admiralty suit, was timely. To allow an untimely LHWCA claim to piggy-back on a prior stale claim would be an abuse of § 913(d)'s tolling provision and would subvert the purpose of statutes of limitation. Such statutes aim to provide fairness to defendants and to afford plaintiffs a reasonable period of time within which to present their claims. *See Albertson v. T.J. Stevenson & Co., Inc., 749 F.2d 223, 232 (5th Cir. 1984)* (citations omitted). "Fairness to the defendant requires the prompt vindication of known rights to ensure that the defendant is not prejudiced as a result of lost evidence, fading memories, and disappearing witnesses." *Id.* Here, Avondale would be at a substantial disadvantage in defending against Hill's claim due to the number of years that have passed since his accident. And unlike the employers in *Hollinhead* and *Calloway*, who were able to appropriately investigate and contest their employees' LHWCA claims due to those employees' having timely filed their initial compensation actions; Avondale never had such an opportunity. Because Hill untimely filed his state compensation claim, Avondale merely had to concern itself with the prescription issue in

state court, rather than the merits of Hill's claim. Accordingly, there was no impetus for Avondale to properly investigate that claim and procure evidence that could later be used in an LHWCA action.

Based on these facts and the differences between this case and the decisions in *Hollinhead* and *Calloway*, we hold that an untimely state law claim cannot toll the statute of limitations for filing a LHWCA claim.

III.

As a corollary to the appeal of the benefits award, Hill also seeks a modification of the attorneys' fees and costs awarded in this case. The ALJ reduced the number of necessary attorneys' fee hours by 75% based on Hill's failure to succeed in the prosecution of his primary claim for permanent total and partial disability compensation. Furthermore, the ALJ excluded hours for services performed prior to the date of the case's referral to the Office of Administrative Law Judges, lowered the hourly rate of one of Hill's counsel, reduced the time requested for telephone calls lacking in specificity, denied some blanket charges for work on non-descript correspondence, and denied charges for unwarranted medical and legal research. The Board affirmed, but it allowed an additional sum for preparation of the fee petition.

We note that an ALJ's reduction of attorneys' fees and costs will be affirmed on appeal unless it is arbitrary, capricious, or an abuse of discretion. *See Ledet v. Phillips Petroleum Co., 163 F.3d 901, 905-06 (5th Cir. 1998).* Here, the ALJ conducted an extensive review of counsel's requested fees and costs, discussing in detail the basis for the adjustments. Based on our examination of the record, we

cannot conclude that the ALJ's analysis was legally infirm or that he abused his discretion in amending the requested attorneys' fees and costs. Consequently, we find no error in the Board's affirmance.

IV.

Because an untimely filed state claim cannot toll the statute of limitations of an LHWCA claim and because the reduction in fees and costs was not an abuse of discretion, the decision of the Benefits Review Board is AFFIRMED.

Footnotes

[1] Section 23:1209 of the Louisiana Revised Statutes provides in pertinent part:

> When the injury does not result at the time of, or develop immediately after the accident, the limitation shall not take effect until expiration of one year from the time the injury develops, but in all such cases the claim for payment shall be forever barred unless the proceedings have been begun within two years from the date of the accident.

[2] Section 913(a) states:

> Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed

> within one year after the injury or death . . . . The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

[3] Section 913(d) states:

> Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subsection (a) of this section shall begin to run only from the date of termination of such suit.

BRB No. 97-1575

Benefits Review Board
United States Department of Labor

GEORGE HILL, Claimant-Petitioner

v.

AVONDALE INDUSTRIES, INCORPORATED,
Self-Insured, Employer-Respondent

August 4, 1998

DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Granting Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

James F. Scott, Gretna, Louisiana, and Rodney P. Vincent (Gertler, Gertler, Vincent & Plotkin, L.L.P.), New Orleans, Louisiana, for claimant.

Joseph J. Lowenthal, Jr., Richard T. Gallagher, Jr., and Elizabeth Slatten Healy (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals

Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Decision and Order Granting Attorney's Fees (94-LHC-3367) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. § 921(b)(3); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980). Claimant testified that he fell and injured his back on October 1, 1980, during the course of his employment as a sandblaster. Employer voluntarily paid temporary total disability benefits from October 28 through November 2, 1980. Cl.Ex. 5. Claimant returned to his usual work until mid-November 1980 when he was transferred from sandblasting to crane hooking. Tr. at 227-228. He continued to work for employer until he was laid off for financial reasons in March 1983. On August 1, 1983, claimant experienced back pain and went to the emergency room. Dr. Fleming informed him that he had two bulging discs, and in late 1983, claimant underwent a lumbar discography and a disc injection. Cl.Ex. 23 at 289-290,

293-294; Cl.Ex. 26 at 709; Tr. at 241-243, 245-246. In 1995, claimant underwent a second surgery on his back. Cl.Ex. 24 at 432-435. Claimant filed a claim for compensation with the state of Louisiana on February 21, 1984, and he filed a claim for compensation under the Act on June 24, 1992. Cl.Exs. 8, 12.

The administrative law judge found that claimant was injured on October 1, 1980, during the course of his employment with employer. Decision and Order at 19-20. He also found that employer received timely notice of the injury under Section 12, 33 U.S.C. § 912, and that employer filed a first report of injury on November 6, 1980. Id. at 21. However, the administrative law judge denied claimant benefits because the administrative law judge found that claimant had failed to file a timely claim for compensation pursuant to Section 13 of the Act, 33 U.S.C. § 913. Specifically, the administrative law judge found that claimant had become aware of the full effect of his condition on August 23, 1983; therefore, he had one year from that date to file a claim under the Act. Decision and Order at 22; see 33 U.S.C. § 913(a). The administrative law judge acknowledged claimant's state filing on February 21, 1984, but noted that such filing was "clearly untimely when filed." [FN1] Id. Nevertheless, he stated that under Section 13(d), the statute of limitations for filing a claim under the Act was tolled from February 21, 1984, until October 2, 1991, the period during which the administrative law judge found that the state claim was pending. Because claimant used six months of his one-year period before filing the state claim, his claim under the Act, which was filed eight and one-half months after the conclusion of the sate claim on October 2, 1991, was

untimely. Id. at 22-23 (citing Ingalls Shipbuilding Div., Litton Systems, Inc. v. Hollinhead, 571 F.2d 272, 8 BRBS 159 (5th Cir.1978); Calloway v. Zigler Shipyards, Inc., 16 BRBS 175 (1984)). Despite citing Calloway, which states that the reasons for the dismissal of a claim filed within the meaning of Section 13(d) are irrelevant, the administrative law judge deemed the fact that claimant's state filing was untimely as "extremely germane" to this case. He stated:

> I find it illogical and absurd to permit the untimely filing of a state claim to suspend or toll the statute of limitations for a longshore claim.... In essence, to permit such a tolling in this case allows Claimant to bootstrap himself into an extension of the one-year statute of limitations. Decision and Order at 23.

Accordingly, the administrative law judge concluded that claimant's June 24, 1992, filing was untimely, and he denied disability benefits. Id. Because medical benefits are never time-barred, and because he concluded that claimant's back condition is related to the work injury, the administrative law judge awarded claimant medical benefits. Decision and Order at 24-25. Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance.

In a supplemental decision, the administrative law judge awarded claimant's counsel an attorney's fee of $15,019.96, representing a reduction from the requested total of

$80,306.19. Claimant appeals the reduction. Employer urges affirmance.

On appeal, claimant contends the administrative law judge erred in finding that his claim under the Act was untimely filed. Additionally, claimant argues that "evidence" attached to employer's response brief before the Board should not be considered, as it was not in the record before the administrative law judge. Employer argues that claimant also submitted additional "evidence" to the Board.

We shall first address the contentions concerning the attachments to the parties' briefs. On February 21, 1984, claimant filed a claim for benefits under the Louisiana workers' compensation law. The Louisiana statute on workers' compensation provides in pertinent part:

> In case of personal injury, including death resulting therefrom, all claims for payments shall be forever barred unless ... within one year after the accident a formal claim has been filed as provided [by this Chapter]. *** Also, when the injury does not result at the time of, or develop immediately after the accident, the limitation shall not take effect until expiration of one year from the time the injury develops, but in all such cases the claim for payment shall be forever barred unless the proceedings have been begun within two years from the date of the accident.

La.R.S. 23:1209(A). Subsection B states in part:

> The filing of such claims shall be deemed timely when the claim is mailed on or before the prescription date of the claim.

La.R.S. 23:1209(B).

In light of this rule, employer disputed the state claim by filing an exception of prescription, and the case came before the district court on May 1, 1991. [FN2] On June 26, 1991, the district court maintained the exception and dismissed the case. Emp. Opp. Brief at Exh. A.

The Louisiana Court of Appeal affirmed the district court's decision on February 25, 1992. Id. at Exh. B. In that decision, the court agreed with employer that claimant's right to bring a claim prescribed one year after his accident. Further, the court stated that employer did not "lull" claimant into a "false sense
of security" so as to interrupt or suspend the period for filing. Thus, it held that claimant is not entitled to either disability or medical benefits under Louisiana law. Id. On October 2, 1992, the Supreme Court of Louisiana denied claimant's petition for a writ of certiorari, and on November 2, 1992, it denied the motion to reconsider its decision. Id. at Exh. C, D; Hill v. Avondale Shipyards, Inc., 606 So.2d 530, 604 So.2d 1304 (La.1992).

These documents, with the exception of the November 2, 1992, denial of reconsideration (Cl.Ex. 18), were not a part of the record before the administrative law judge. In his reply

brief, claimant argues that the Board should disregard employer's attachments to its brief. In a further response, employer makes the same argument regarding the attachments to claimant's brief.[3] We reject the arguments pertaining to the parties' attachments to their briefs. The documents were submitted to demonstrate that the court's denial of reconsideration, which is a part of the record at Cl.Ex. 18, has a typographical error in it and, consequently, that the administrative law judge's decision has a mistake in it regarding when the Supreme Court of Louisiana took action on claimant's state claim. Not only does employer agree with the dates in claimant's recitation of the facts, but the denials were published, see supra, and are easily confirmed. Moreover, all the attachments are official court documents which are consistent with each other, and with which no party has a dispute. The parties' arguments that the Board should not consider the court documents because they were not a part of the record before the administrative law judge lack merit: the documents are relevant, are a matter of public record, and are properly the subject of judicial notice. See generally Win-Tex Products Inc. v. U.S., 829 F.Supp. 1349 (Ct. Int'l Trade 1993). Therefore, we hereby take judicial notice of the court documents and the appropriate dates therein, and we deny the parties' motions to strike.

With regard to the Section 13, claimant contends the administrative law judge erred in finding his claim to have been filed in an untimely manner. Claimant specifically argues that his claim under the Act was filed during the pendency of the state claim, and not eight and one-half months afterwards as the administrative law judge stated, because the state claim came to a final resolution on

November 6, 1992, the date the Louisiana Supreme Court denied reconsideration of its denial of certiorari. In response, employer agrees that the correct date on which the Louisiana Supreme Court denied claimant's appeal of the state claim was October 2, 1992, and that reconsideration was denied on November 6, 1992.

Section 13(a) of the Act permits a claimant one year after the date he becomes aware or should have been aware of the relationship between his injury and his employment to file a claim. 33 U.S.C. § 913(a). In this case, the administrative law judge found that claimant's date of awareness was August 23, 1983, but his claim for benefits under the Act was not filed until 1992.[4] Section 13(d), however, provides:

> Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

33 U.S.C. § 913(d). Section 702.222(b) of the regulations provides much the same, stating:

> Where a person brings a suit at law or in admiralty to recover damages in respect of an injury or death, or files a claim under a State workers' compensation act because such person is excluded from this Act's coverage by reason of section 2(3) or 3(d) of the Act [citations omitted], and recovery is denied because the person was an employee and defendant was an employer within the meaning of the Act, and such employer had secured compensation to such employee under the Act, the time limitation in § 702.221 shall not begin to run until the date of the termination of such suit or proceeding.

20 C.F.R. § 702.222(b). Thus, if the provisions of Section 13(d) apply, the one-year statute of limitations in Section 13(a) is tolled and the time does not begin to run until the completion of the other claim.

The Board has held that the filing of a claim under the Jones Act or the filing of a third-party suit for damages within one year of the date of injury is sufficient to toll the statute of limitations pursuant to Section 13(d) of the Act. Vodanovich v. Fishing Vessel Owners Marine Ways, Inc., 27 BRBS 286 (1994); Calloway, 16 BRBS at 175; McCabe v. Ball Builders, Inc., 1 BRBS 290 (1975). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has held that the filing of a state compensation claim tolls the one-year statute of limitations of Section 13(a) pursuant to Section 13(d). Hollinhead, 571 F.2d

at 272, 8 BRBS at 159.[5] The Hollinhead court based its decision on the opinion in Wilson v. Donovan, 218 F.Supp. 944 (E.D.La.1963) (holding that the filing of a state compensation claim tolls the statute of limitations under the Act because a state compensation claim is one for "damages" under that term's accepted legal definition), aff'd per curiam sub nom. T. Smith & Son, Inc. v. Wilson, 328 F.2d 313 (5th Cir.), cert. denied, 379 U.S. 816 (1964). The Board subsequently stated that the grounds upon which recovery in the claim for damages is denied are irrelevant because it is the filing of the action which tolls the time limits. Calloway, 16 BRBS at 177. The Board's holding was based on Hollinhead, wherein the court did not, and in fact was unable to, consider reasons for dismissal of the state claim due to the withdrawal of the claim, yet it proceeded to toll the time period for filing a claim under the Act. Id.; see Hollinhead, 571 F.2d at 272-274, 8 BRBS at 159-160.[6]

Because the parties do not dispute the dates on which the state courts took action in claimant's state claim, and because there is substantial evidence to demonstrate that the administrative law judge relied on the typographical error in Cl.Ex. 18, we hold that the administrative law judge erred in finding that claimant's state claim ended on October 2, 1991, and we modify the decision to reflect the correct date of the court's denial of certiorari as October 2, 1992. Hill, 604 So.2d at 1304. Further, we hold that the state claim did not reach its final resolution until the date the court denied reconsideration on November 6, 1992. Hill, 606 So.2d at 530. As claimant asserts, his claim under the Act was filed during the pendency of his state workers' compensation claim, and not over eight months after it was resolved.

Moreover, given the language of both Section 13(d) and Section 702.222(b), it was inappropriate for the administrative law judge to have calculated claimant's one-year time period from the date of awareness and again from the date of the resolution of the state action and then to have added the durations together to conclude that claimant's year had expired. Rather, both the Act and the regulation provide that the time limitation does not begin to run until the other proceeding has terminated. 33 U.S.C. § 913(d); 20 C.F.R. § 702.222(b). Thus, the administrative law judge erred in finding claimant's claim untimely on this basis; if Section 13(d) applies to toll the time period of Section 13(a), then claimant's June 1992 claim is timely.

In this regard, claimant argues that, pursuant to Calloway, 16 BRBS at 175, the reason for the dismissal of the state claim is irrelevant, and the administrative law judge erred in disregarding this established precedent: that is, he erred in giving weight to the state's finding that the state claim was filed in an untimely manner. Claimant thus contends his filing of a claim under the Louisiana workers' compensation law tolled the statute of limitations for filing a claim under the Act because the state claim was filed within one year of the date of awareness under the Act. Employer responds, arguing that claimant's untimely filing of a state claim should not be permitted to toll the filing of a claim under the Act, particularly, because claimant, after October 1, 1982, two years after his October 1980 accident, did not have a legal right to assert a state workers' compensation claim.

Claimant filed a claim for benefits under the state law on February 21, 1984. The state denied claimant benefits because his claim was prescribed by law. Pursuant to subsection 1209(A) of the Louisiana workers' compensation law, the district court found that claimant's state claim is "forever barred" because proceedings did not begin within the allotted time after the date of the accident. Therefore, employer correctly asserts that claimant was barred from receiving payments under the Louisiana law because the claim was untimely filed. The question before the Board, however, is whether claimant's untimely state filing affects the statute of limitations under Section 13(d) of the Act.

In Calloway, the decedent died as a result of an explosion at work. One year later, several claimants filed suit, seeking benefits under the Jones Act and contending the employer was the owner pro hac vice of the barge. The district court dismissed the complaint on a motion for summary judgment, holding that the employer was not the owner pro hac vice and that the decedent was not a "seaman" under the Jones Act. While the admiralty claim was pending, the claimant filed a claim under the Act. The administrative law judge found that the claim under the Act was timely filed because Section 13(d) applied to the case. Calloway, 16 BRBS at 176-177. On appeal, the Board rejected employer's argument that Section 13(d) did not apply because the admiralty claim was not dismissed for the reasons explicitly stated in Section 13(d), i.e., because the decedent was an employee and Zigler was an employer under the Act and because Zigler secured compensation for the decedent. Rather, the Board relied on Hollinhead wherein the Fifth Circuit found that the statute of limitations was tolled even though it did not consider the

reasons for the termination of the state claim because the case had been withdrawn. Consequently, the Board held that, in the Fifth Circuit, "the grounds upon which recovery is denied in a suit brought at law or in admiralty are irrelevant because the filing of an action alone tolls the Section 13(a) statute of limitations." Id. at 177. Accordingly, the Board affirmed the administrative law judge's determination that the claimant's claim under the Act was timely.

We hold that the administrative law judge correctly distinguished this case from Hollinhead and Calloway based on the fact that the state claim was not timely filed as required by the state law, and that he rationally concluded it would be illogical to permit an untimely state filing to toll the Act's statute of limitations. The general purpose of a statute of limitations is "to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend." 51 Am.Jur.2d Limitation of Actions § 17 (1970). More specifically, statutes of limitation are:

> designed to prevent undue delay in bringing suit on claims and to suppress fraudulent and stale claims from being asserted, to the surprise of the parties or their representative, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses.
>
> ***
>
> [T]he purpose of a limitation upon the time within which an action may be commenced

> is to insure repose and to require that claims be advanced while the evidence to rebut them is still fresh.

Id.

The Ninth Circuit recently stated that Section 13 of the Act "serves a purpose of repose ... it settles financial disputes within a specified period of time." Jones Stevedoring Co. v. Director, OWCP, 133 F.3d 683, 692, 31 BRBS 178, 185 (CRT) (9th Cir.1997).

Given the purpose of the statute of limitations, i.e., that of repose, employer's argument that an untimely filed state claim cannot toll the statute of limitations under the Act has merit. In defending itself against the state claim in this case, employer needed only to address the timeliness of the claim. Because it was filed over two years after the date of the accident, with no evidence of or cause for suspension, the state court held that the claim was prescribed. Had claimant filed a timely claim with the state, employer would have had to investigate the merits of the claim, which evidence could be used in a later longshore claim. Because the merits of the case were not at issue until 1992 when claimant filed his claim under the Act, 12 years after the date of the accident, employer could be at a substantial disadvantage in investigating and defending against the claim. See generally Kashuba v. Legion Ins. Co., 139 F.3d 1273, 32 BRBS 62 (CRT) (9th Cir.1998) (evidence that lack of timely notice under Section 12 impeded employer's investigation sufficient to show prejudice); Jones Stevedoring, 133 F.3d at 692, 31 BRBS at 185 (CRT).

We agree with the administrative law judge that it is illogical to allow an untimely filed state claim to toll the time for filing a claim under the Act. Consequently, we distinguish both Hollinhead and Calloway from the case at bar on the basis that timeliness of the initial claim was not an issue in those cases. As a result, those employers did not face the dilemma of defending against a stale claim, which is what claimant asks us to require of employer.[7] To give full effect to the time limitations under both workers' compensation laws, we hold that a claim which is filed in an untimely manner under a state compensation law cannot toll the statute of limitations for filing a claim for benefits under the Act. To hold otherwise would not only defeat the purpose for establishing statutes of limitation but would reward claimant for filing two delinquent claims, and this we decline to do. Totty v. Dravo Corp., 413 So.2d 684 (La.Ct.App.1982); 51 Am.Jur.2d Limitation of Actions § 17. Therefore, we affirm the administrative law judge's conclusion that claimant's claim under the Act was not timely filed, and we affirm the denial of disability benefits.

Finally, claimant's counsel appeal the fee award contending the administrative law judge erred in awarding an attorney's fee which is substantially less than the fee requested. Based on the award of medical benefits, which are never time-barred, the administrative law judge awarded claimant's counsel an attorney's fee of just over $15,000, instead of the requested fee of over $80,000, and counsel contend this is erroneous.

The administrative law judge addressed each of employer's objections in his well-explained decision. He first agreed that

all entries dated prior to the date the district director transferred the case to the Office of Administrative Law Judges were not properly before him, and he reduced the requested amount by 80.5 hours and the expenses by $195.40. With regard to the hourly rate, the administrative law judge determined that $125 per hour is a reasonable rate for each of the two attorneys working on claimant's case. Supp. Decision and Order at 3. He then reduced the requested time for some telephone calls and for one- page correspondence in accordance with the Fifth Circuit's mandates in Ingalls Shipbuilding, Inc. v. Director (OWCP) [Biggs], No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished), and Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley], No. 89-4459 (5th Cir. July 25, 1990) (unpublished). Supp. Decision and Order at 3-4. The administrative law judge determined that claimant was only 25 percent successful in the prosecution of his claim; therefore, he reduced all charges which indicated "trial preparation" and "research" by 75 percent. He then denied all time spent preparing the fee petition, awarded all time requested for "wind-up" charges, denied some of the claimed costs because of a lack of success on the timeliness issue, and reduced all uncontested entries by 75 percent based on the degree of claimant's success. Supp. Decision and Order at 6-10. Therefore, the administrative law judge awarded a total of $851.25 for Attorney Vincent's services and $13,127.50 for Attorney Scott's services. Id. at 9-10.

Initially, inasmuch as we have affirmed the administrative law judge's finding that the claim was untimely filed, we reject counsel's contention that they are entitled to the full fee requested. Neither counsel nor employer contests the

administrative law judge's application of Hensley v. Eckerhart, 461 U.S. 424 (1983), to the attorney's fee issue. See also George Hyman Construction Co. v. Brooks, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C.Cir.1992).

Counsel also argue that the administrative law judge erred in disallowing a fee for 8.75 hours spent preparing the fee petition. Only the United States Court of Appeals for the Ninth Circuit has spoken on this issue, as it relates to claims under the Act, and it has held that time spent preparing a fee petition is compensable. Anderson v. Director, OWCP, 91 F.3d 1322, 30 BRBS 67 (CRT) (9th Cir.1996). The Board followed Anderson in a case which arose in the Ninth Circuit, Price v. Brady-Hamilton Stevedore Co., 31 BRBS 91 (1996), and we shall follow it in this case. Because we held that the administrative law judge rationally determined that claimant was 25 percent successful in prosecuting his claim, we shall modify the attorney's fee and award counsel an additional $273.44, representing 2.19 hours (25% of 8.75 hours) at a rate of $125 per hour, for preparation of the fee petition. Anderson, 91 F.3d at 1322, 30 BRBS at 67 (CRT); Price, 31 BRBS at 95.

Additionally, counsel contend the administrative law judge erred in reducing the fee based on employer's unsupported assertions and due to the lack of specificity in the telephone call entries, as being more specific would violate the attorney-client privilege, and they argue they are entitled to a fee for three hours of work performed researching a medical issue on June 18, 1995. We reject these assertions, and we hold that the administrative law judge properly applied Fairley to reduce some of the specific entries, see Bullock v. Ingalls Shipbuilding, Inc., 29 BRBS 131 (1995) (Decision on

Remand) (en banc), and he reasonably reduced the requested time for research in preparation for a deposition. [FN8] As the fee award is otherwise fully explained and reasonable in light of claimant's limited success, we affirm the remainder of the fee award. See Ahmed v. Washington Metropolitan Area Transit Authority, 27 BRBS 24 (1993).

Accordingly, the administrative law judge's Decision and Order is affirmed. The attorney's fee is modified to reflect counsel's entitlement to an additional $273.44, consistent with this opinion. In all other respects, the Supplemental Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

Footnotes

[1] Louisiana requires a workers' compensation claim to be filed, at the latest, within two years of the date of the accident. La.R.S. 23:1209; see discussion infra.

[2] There is no explanation for the delay.

[3] In a supplemental reply, claimant argues that employer's second response brief should not be considered because the briefing schedule had ended. Although, presuming the time for filing has not expired, the briefing schedule generally ends after the Board's receipt of the reply brief, the regulations permit the filing of additional briefs. 20 C.F.R. § 802.815. As employer's second response brief and claimant's supplemental reply brief were filed within a reasonable time after the reply brief, we hereby accept them.

[4] In its opposition brief, employer challenges the date of awareness, submitting that, as it pertains to timeliness, the date found by the administrative law judge is incorrect and should have been a much earlier date. Claimant contends this issue was not properly raised on appeal. Employer's argument, however, which challenges a finding of the administrative law judge, is raised as an alternate avenue for reaching the same favorable judgment and shall be addressed. Dalle Tezze v. Director, OWCP, 814 F.2d 129, 10 BLR 2-62 (3d Cir.1987); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190 (1984). Nevertheless, the record supports the administrative law judge's finding that claimant became aware of the full extent of his disability on August 23, 1983, and not at an earlier time. Decision and Order at 12-13; Cl.Ex. 23. Therefore, we reject employer's argument that the date of awareness should have been the date of the accident. See generally Lindsay v. Bethlehem Steel Corp., 18 BRBS 20 (1986).

[5] The United States Court of Appeals for the First Circuit, in dicta, expressed doubt as to whether a state workers' compensation claim meets the tolling requirements of Section

13(d). Bath Iron Works Corp. v. Director, OWCP [Acord], 125 F.3d 18, 31 BRBS 109 (CRT) (1st Cir.1997); but see 20 C.F.R. § 702.222(b) (relating to a state claim filed because of the Section 2(3) and Section 3(d) exceptions to coverage).

[6] The brief decision of the court in Hollinhead also adopted and reprinted the "well-reasoned" opinion of the administrative law judge in that case that the filing of a state claim tolls the statute of limitations pursuant to Section 13(d). The claimant's federal claim was filed seven months after the state claim was withdrawn. 571 F.2d at 272, 8 BRBS at 159.

[7] Indeed, the decision of the administrative law judge in Hollinhead, adopted by the Fifth Circuit, states that

> Statutes of limitation generally proceed on the theory that a man forfeits his rights only when he inexcusably delays assertion of them. I hold that the filing and processing by claimant of his [state claim] is an adequate excuse under Section 13(d) of the [Longshore] Act within the year allowed by Section 13(a) of said Act, and that Claimant's claim is not barred by the time limitation provided in Section 13(a). There is no evidence that respondents suffered any prejudice due to the failure of claimant to file his claim within the statutory period. Section 13 was not intended to provide a technical device to release the employer and insurer from their obligations, but merely to

> prevent prejudice to them from the entertainment of stale claims.

Hollinhead, 571 F.2d at 274-275, 8 BRBS at 161. In the instant case, to allow an untimely state claim to toll the statute of limitations under the Longshore Act would prejudice employer.

[8] Counsel stated that they needed to research "chymopapaine" ("an enzyme used to break down the mucopolysaccharide-protein complexes in the nucleus pulposus of [a] herniated intervertebral disk" Dorland's Illustrated Medical Dictionary (27th ed.)) in preparation for Dr. Fleming's second deposition in 1995. Because claimant's chymopapaine injection occurred in 1983 and because Dr. Fleming discussed this treatment in his first deposition in 1994, Cl.Ex. 23 at 15-16, 34, 91, the administrative law judge rationally concluded that additional research was unnecessary.

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(504) 589-6201
Case No. 94-LHC-3367
OWCP No. 07-72572

IN THE MATTER OF:

GEORGE HILL,
Claimant,

VERSUS

AVONDALE SHIPYARDS, INCORPORATED,
self-insured employer,

July 2, 1997, Decided

COUNSEL:

For GEORGE HILL, Claimant - Petitioner: James F Scott, III.

For AVONDALE SHIPYARDS, INCORPORATED, Respondent: Joseph J Lowenthal, Jr, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, LA.

Before: Lee J. Romero, JR. Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. Sec. 901, et seq., brought by George Hill (Claimant) against Avondale Industries Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, a formal hearing was held on February 8-9, 1996, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer doctumentary evidence and submit post-hearing briefs. Claimant offered 24 exhibits, Employer proffered 18 exhibits which were admitted into evidence along with one Joint Exhibit. This decision and order is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was allegedly injured on October 1, 1980.

2. That there existed an employee-employer relationship at the time of the alleged accident/injury.

3. That Employer filed a Notice of Controversion on July 14, 1992 and July 23, 1992.

4. That no informal conference before the District Director was held.

5. That Claimant received temporary total disability benefits from October 28, 1980 through November 2, 1980 at a compensation rate of $239.61 for 6/7 weeks or a total of $205.38.

6. That Claimant's average weekly wage at the time of the alleged injury was $359.41 and at the time of his February 4, 1983 lay off was $378.17. (Tr. 590).

7. That medical benefits f or services rendered by Dr. C. 3. Meyers to Claimant have been paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. The fact of accident and injury during the course of employment.

2. The nature and extent of Claimant's disability.

3. Statute of limitations.

4. Compliance with Section 7 of the Act.

5. Attorney's fees, penalties and interest..

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was born on January 22, 1944, and achieved a 7th grade education but stated he can not read or write. (Tr. 214). He began employment with the Employer in 1967 and always performed heavy labor. He testified that he suffered a back injury on October 1, 1980, when he fell more than 12 feet from a ladder while sandblasting in the paint department of Employer. (Tr. 215—217).

Claimant testified that he was knocked out from the fall and when he came to he had to crawl out of his work area. (Tr. 218). He reported his accident to foreman Nellie Bertrand and to first aid. (Tr. 218-220). Claimant informed first aid that he had been knocked out by the fall. (Tr. 281). Claimant stated that Dr. Mabey gave him pain pills and took x-rays. He was not told what was wrong with his back and returned to work that day. (Tr. 221-222). He returned to work the following day at which time Dr. Mabey told him "to go to work and try to work it out." (Tr. 223).

On October 24, 1980, he saw his family doctor, Dr. C. J. Meyers for his back injury. (Tr. 224—225). He has also seen Dr. Meyers for medical problems other than his back.

However, Claimant asserts that he was not then treated by a physician of his choice. (Tr. 289—290). He saw Dr. Meyer on only two occasions. At the first visit, Dr. Meyer gave him medications but did not give any medications on the second visit. (Tr. 299). He was taken off work for one week. He did not inform Dr. Meyer that he was knocked unconscious or place any distance on his fall from the ladder. (Tr. 294-295). Claimant testified that Dr. Meyer did not tell him he could return to work but "fixed" a paper which he returned to first aid. He stated that his back was "worrying" or hurting him and he did not ask Dr. Meyer if he could return to work. (Tr. 300-302). He did not remember Dr. Meyer telling him anything about returning to see him again. (Tr. 304).

Claimant stated that he did not go to the hospital for his back injury after the accident until August, 1983. (Tr. 296). He continued to see Dr. Mabey and Dr. West at Avondale First Aid. (Tr. 298). Claimant testified that the only way he could work after being of f for one week was with over—the—counter medications and medications received from Dr. Mabey in first aid in the form of a "little yellow pill." (Tr. 262-264). He stated that he continued to receive medications from Dr.Mabey through late 1983. (Tr. 263, 271-272). Claimant stated that first aid never informed him that he may have a herniated or bulging disc, degenerative disc disease or may require surgery. (Tr. 227-228).

Claimant testified that in mid—November, 1980, he was transferred out of the sandblasting department into the crane department as a hooker because of his back injury. (Tr. 227—228). According to Claimant, sandblasting was hard work and required him to stand and climb which he could not

do after his back injury. (Tr. 232). Hooking was much easier work because he did not have to lift as much weight, received assistance from the operator and other workers and had breaks from work activity on the job. (Tr. 228-229, 233). Claimant testified however that he worked in pain as a hooker which required him to take pain medications. (Tr. 232).

Claimant stated that he continued to work as a hooker until about March, 1983 when he was laid of f by Employer. (Tr. 234). He was recalled to Avondale on March 17, 1983, but not rehired. Dr. Mabey informed him that he could not be rehired because he had high blood pressure and a bad knee problem. (Tr. 235—236).

Claimant testified that on August 1, 1983, he went to the emergency room at West Jefferson Hospital because his "back was worrying" him. He stated that he did not re-injure his back but was experiencing back pain from his job injury in :L980. (Tr. 238-239). X—rays were taken in the emergency room and Claimant was referred to Dr. Fleming for evaluation. (Tr. 240). Dr. Fleming informed Claimant that he had two bulging discs and would have to have surgery. Pain pills were prescribed. (Tr. 241—243). Claimant informed Dr. Fleming of his October 1, 1980 job injury. Accordingly to Claimant, Dr. Fleming told him that after surgery he would not be able to do anything or work with his back. (Pr. 243-244)

Claimant testified that he underwent a disc injection in late 1983 which made him feel better but his back began to "worry" him again. (Tr. 245-246). Dr. Fleming informed him

not to pick up anything over ten pounds in weight. (Tr. 248). Claimant stated that he thinks he could have performed work before and after his first surgery because he was taking pain pills on the job. (Tr. 249). He then recanted that he did not believe he could work after the injection because he began having pain down his leg. (Tr. 250). He added that after the injection, his back was worse. (Tr.251)

Claimant underwent a second surgery in March, 1995, 12 years after the injection because his back started "worrying" him again.(Tr. 252). Claimant stated that the back pain was the same pain he experienced from his job injury in 1980. Claimant testified that he did not think he would ever be able to sandblast or hook for cranes again. (Tr.252-253). Claimant related that Dr. Fleming never told him that he could return to work after the first injection in 1983.

Claimant believes that since his second surgery he is now more restricted in his activities since he wears a back brace. (Tr. 254). He can not walk or stand for "long periods" or bend, squat or sit for long periods of time. (Tr. 255). He has always worked as a laborer but can no longer do laborer's work. (Tr. 256). He takes Vicodin—ES for pain which makes him sleepy. He was not aware when he would reach maximum medical improvement from his March, 1995 surgery. Claimant has been receiving Social Security disability benefits since January, 1985. (Tr. 259-260).

On cross—examination, Claimant testified that he received pain pills from Avondale first aid after November 3, 1980, however in his pre-hearing deposition Claimant acknowledged that pills produced at the deposition were the

"same, exact" pills provided by Dr. Mabey on the first day he went to first aid fifteen years ago. (EX—11, p. 2; EX-12). At the hearing, Claimant recanted and stated that the pain pills were not the same pills provided to him in 1980. (Tr. 269, 274). Moreover, Claimant further testified that Dr. Mabey continued to give him pain pills from time to time after his October, 1980 injury. (Tr. 275).

Incredulously, in deposition, Claimant testified that he only received pain pills from Dr. Mabey on the first day in first aid and thereafter purchased and used over—the—counter medications. (EX-13). Further, in deposition, Claimant stated that the remaining pills identified as received in 1980 were the "original pills" given to him and the container was never refilled. (EX-14). At hearing, Claimant could not recall stating that he received only one container of pills. (Tr. 277—278).

Claimant acknowledged that he sought and retained legal representation before his October 1, 1980 injury for a lung disease claim he filed against Employer as well as a civil lawsuit filed on August 12, 1980. (Tr. 313, 315—316; EX—16; EX—17). He further acknowledged that he sought no medical treatment from the time of his layoff in March, 1983 to his emergency room visit in August, 1983. (Tr. 327).

Claimant denied telling the doctor at West Jefferson Hospital that his back began hurting the night before his visit to the emergency room. (Pr. 328). He reaffirmed that he reported his 1980 injury and continuing pain therefrom. He stated that if the report indicates that he denies injury," it is

not wrong. (Tr. 329, 331). However, if the report did not mentioned his 1980 injury it was wrong. (Tr. 331).

Claimant further testified that from November, 1980 to February, 1983, he was seen or treated by Drs. Hans Weill, Kenneth Smith, Morton Brown, an Ochsner Foundation doctor and C. J. Meyers, but did not complain about this back or back pain or that he had been knocked unconscious from his 1980 fall, because they were not back doctors. (Tr. 332-333). It is noted that Dr. Meyers initially treated Claimant for his back injury. (Tr. 333).

Claimant stated that he did not recall Dr. Brown or any other doctor giving him blood pressure or fluid pills and any reports the contrary would be wrong. (Tr. 335). He further disputed record by Dr. Weill that he reported he was not having difficult with his job as a crane hooker. (Tr. 341).

He testified that he could have continued to work in pain he had not been laid off. (Tr. 341). However, in deposition Claimant failed to mention pain as a qualification to his continue employment. (Tr. 343; EX-18). Claimant testified that his pain medications make his stomach upset but caused no other effect which apparently included the sleepiness previously mentioned. (T 342). Claimant disputed that he stated in deposition he would not apply for a job within his physical restrictions. (Tr. 346—34 EX-19). He acknowledged that he did not seek employment from late 1983 through the date of his second surgery in March, 1995. (Tr 360). He can not drive for long distances since his second surgery. (Tr. 348). After his lay off, he applied for unemployment compensation certifying that he was capable

of gainful employment (Tr. 347-348), however he ceased drawing benefits on advise of counsel. (Tr. 352).

Reverend Edward Joseph

Reverend Joseph testified that he worked for Employer for 28 years as a crane operator and with Claimant as a crane hooker for about one and one-half years.. (Tr. 179). He recalled that Claimant transferred from the paint department, where he was injured, to the crane department. Claimant was unable to "handle himself" like the other hookers with whom Reverend. Joseph had worked in the past, and Reverend Joseph helped Claimant pull cable) through on truck loads. (Tr. 181—183).

Reverend Joseph testified Claimant informed him that he fell and injured his back and that he saw Claimant take medication on the job, but did not know the reason for the use of medication. (Tr. 183, 185). He also observed Claimant bend at the knees and hold his back while hooking. (Pr. 188). Claimant went to first aid during work, but Reverend Joseph did not know the reason for such visit; he assumed the visit related to Claimant's back. (Tr. 199). However, Claimant never told him that he visited first aid because of his back. (Tr. 200).

Reverend Joseph testified that Claimant was capable of performing his hooking job "to a certain extent." In deposition, Reverend Joseph stated that Claimant could perform his job without qualification and when or if he needed help. Reverend Joseph would help Claimant. (Tr. 201). Reverend Joseph also signed a pre deposition affidavit

wherein he stated that Claimant regularly complained of back pain. At hearing, he clarified that he assumed Claimant was complaining about his back when he indicated he was "hurting" because he did not know of any other reason for Claimant to voice complaints. (Tr. 210-211). He did not regard Claimant as a complainer. (Tr. 212).

J. D. Roberts

Mr. Roberts worked at Employer from 1972-1982 in the safety department and in 1977-1978 transferred to the workers' compensation department as its manager. (Tr. 92). According to Mr. Roberts, Claimant's personnel records show that he was transferred to the job of crane hooker on August 14, 1980 at the hourly rate of $8.90. (Tr. 101; CX—26, p. 677). However, Mr. Roberts testified that the personnel records are not accurate when compared to the first aid records and compensation files. (Tr. 110). According to Mr. Roberts and the initially filed medical report, Claimant was still working in the paint department when he suffered an injury described as "discomfort—lumbar spine." (Tr. 110, 130—131; CX—26, p. 580).

Claimant chose Dr. C. J. Meyers as his treating physician according to Mr. Roberts. (Tr. 120; CX—26, p. 580). Although Dr. Meyers discharged Claimant from treatment on October 31, 1980 with no limitations, he noted on his physician report (Form LS-1) dated November 7, 1980, that Claimant was to be seen "four x (times) yearly." (Tr. 120, 163; CX—26, p. 581).

Mr. Roberts testified that Claimant was transferred from the paint to the crane department because of his lung condition, not his back problem. On August 14, 1980, Dr. Morton Brown, a pulmonologist, recommended that Claimant discontinue his present occupation as a sandblaster. (CX—26, p. 585). Mr. Roberts considered hooking work to be sheltered employment because wages were paid in lieu of compensation. (Pr. 132). His rate of pay was not reduced which placed him at an hourly rate higher than a hooker with no experience who was paid $5.00—5.50 per hour. (Tr. 123, 127).

Mr. Roberts stated that a sandblaster works nine hours per day and is required to climb, lift, pull and do a "number of seriously physical activities." • (Pr. 124). A sandblaster wears a hood which weighs between 20-40 pounds. (Pr. 125). A crane hooker or rigger hooks the load to be lifted, may be required to climb, pull slings and signal the operator. (Tr. 126).

On cross-examination, Mr. Roberts testified that Claimant did not seek any passes in 1982 for medical treatment for his back. (Tr. 154). He received passes for treatment of abdominal pains and chest pains in September, 1982, from which, he returned to work in October, 1982. (Pr. 156 , 157). Moreover, according to Mr. Roberts, Claimant's composite records do not reflect any complaints of back ache or pain after November 3, 1980 through February 4, 1983 when he was laid off for economic reasons. (Tr. 157-158).

Mr. Roberts testified, after reviewing Claimant's first aid and workers' compensation files, that there was nothing

to suggest that Claimant needed to be assigned to permanent light duty because of his back injury of October 1, 1980. (Tr. 160). Claimant was placed in a medical surveillance program because of his lung condition, but did not voice any back complaints while under surveillance. (Tr. 166). Mr. Roberts stated that he would not placed a worker with a back problem or condition into hooking or rigging because of the amount of bending, twisting and climbing required. (Tr. 168). However, hooking was considered a lighter job than sandblasting because of periods of downtime and less exertional demands. (Tr. 170).

Notwithstanding his testimony that hooking is sheltered employment, Mr. Roberts acknowledged that hooking was a real job and that a crane can not be operated without the work of a hooker. (Tr. 161)

The Medical Evidence

Dr. Joseph Mabey

Dr. Mabey was accepted as an expert in the medical specialties of general surgery and occupational medicine in which he is board— certified. (Tr. 377—379). During the period from 1980—1983, Dr. Mabey was on the staff of Ochsner Foundation Hospital which loaned his services out to Employer. (Tr. 379).

Dr. Mabey described the Employer's medical surveillance program as a monitor of patients who are exposed to noxious or fibrogenic dust, such as Claimant in this case. (Tr. 380). Claimant was first treated by Dr. Mabey

in the Employer's first aid on August 7, 1980 for pulmonary complaints. He informed Dr. Mabey that he was taking high blood pressure and fluid medications. (Tr. 383). He thereafter followed up with Claimant on August 20, 1980 and September 3, 1980, for his pulmonary condition. (Pr. 383—384).

On August 2, 1982, Dr. Mabey next saw Claimant who was then working as a hooker but still having pulmonary problems. Claimant did not voice any complaints about a back problem or back pain. Dr. Mabey stated that Claimant reported some abdominal complaints which would have prompted him to ask Claimant about any back problems. (Tr. 385-386). On October 18, 1982, Dr. Mabey again saw Claimant after he had been worked up .by a local doctor and released for unrestricted work, but who had not investigated Claimant's gastrointestinal pathology to Dr. Mabey's satisfaction. Claimant did not voice any back complaints to Dr. Mabey on this visit or any difficulties performing his hooking duties. (Tr. 387). Dr. Mabey did not see Claimant again before he was laid off in February, 1983. (Tr. 390)

Dr. Mabey testified that he did not treat Claimant for complaints arising out of his accident of October 1, 1980. (Tr. 390). He stated that he always charts any prescribed medication for patients and did not prescribe any medications for Claimant's back problems. (Tr. 391). Dr. Mabey testified that Claimant was seen in first aid on October 1, 1980, by an LPN nurse at which time he reported falling from a ladder and striking his right upper side and hip. Claimant did not report that he had been knocked unconscious. A contusion on his right buttocks was noted to be rechecked the next

morning. However, Claimant did not return to first aid the next day. (Tr. 392-393).

On October 10, 1980, Claimant was next seen in first aid for his back condition by Dr. West. (Tr. 395). On October 17, 1980, Claimant was again seen by Dr. West and reported he was presently doing work as a hooker. Claimant was treated in first aid on October 24, 1980 and November 3, 1980, by which time he had been released for regular duty by Dr. Meyers. From November 3, 1980, through the date of his lay off on February 4, 1983, Claimant did not return to first aid for follow-up treatment of his October 1, 1980 injury. (Tr. 397)

Dr. Mabey testified that on March 17, 1983, he evaluated Claimant for re-hire upon recall from lay off. He obtained a history from Claimant but no complaints were made of back pain or back problems. (Tr. 398-399). Dr. Mabey testified that he was concerned with Claimant's cardiopulmonary complaints of recurring chest pains, discomfort, shortness of breath and pain in his left knee with squatting. He did not diagnose a torn ligament in Claimant's left knee or inform Claimant of such a condition. (Tr. 399-400). He examined Claimant's back but found no problems and did not place Claimant at risk for his back problems. (Tr. 401, 404)

Dr. Mabey testified that Claimant's records do not reveal much time lost because of his October 1, 1980 injury or any reported problems performing the duties of a hooker which was considered heavy work. (Tr. 406, 409). Hypothetically, Dr. Mabey stated that Claimant's December,

1983 injection was not related to his accident of October, 1980. (Tr. 411—412).

Dr. Mabey opined in a December 9, 1983 letter to Bill Koch of the Employer's Workers' Compensation Department that Claimant's 1980 injury "seemingly resolved" since it was never mentioned after he was released by his private doctor. On November 3, 1980, Claimant was examined after being released by Dr. Meyer and before returning to work. Dr. Mabey notes that Claimant denied complaints and the exam was completely negative. Claimant was released for work to return in the event of recurring problems, but never returned. Dr. Mabey opined that Claimant suffered a direct trauma to his lower lateral trunk and hip which neither precipitated" nor provided the etiological force responsible for his lumbar disc syndrome three years later. (CX-26, pp. 561-562). Dr. C. 7. Meyers

Dr. Meyers treated Claimant as early as July 11, 1980 for shortness of breath. (EX-3, p. 19). He treated Claimant for palpitations, gastritis and shortness of breath during the period of December 10, 1985 through January 20, 1989, but otherwise no other complaints. (EX-3, pp. 2.21).

On October 24, 1980, Claimant was evaluated for right hip, leg pain and low back pain as a result of a fall from a ladder three weeks before. (EX—3, p. 18). Dr. Meyer ordered x—rays of the lumbar spine and right hip which revealed normal studies. (EX-3, pp. 18, 72). Claimant was placed on bed rest with use of a heating pad. On October 31, 1980, Claimant was again seen by Dr. Meyer who noted only

a "leg injury" and that Claimant was to see him "4X yearly." (EX—3, p. 18).

Claimant returned to Dr. Meyers complaining of low back ache and bilateral leg pain in November, 1991. (EX-3, p. 89). He sought treatment for low backache intermittently through 1994. (EX-3, pp. 78-81). Diagnostic testing conducted in November 1994 revealed circumferential bulging at L4-5 with a bony protrusion posteriorly at L4-5. (EX—3, pp. 105, 166).

Dr. Hans Weill

Dr. Weill testified at the hearing that he is a board-certified pulmonary and internal medicine specialist at Tulane Medical Center who was accepted as an expert in both medical specialties. (Pr. 436). He evaluated Claimant on November 11, 1980, at the behest of Counsel for Employer. Dr. Weill testified that he took a patient history broader than Claimant' s lung problems. (Pr. 440).

Claimant reported that he was a sandblaster at Avondale who was then working as a crane hooker. He became short of breath with activity such as climbing stairs, pulling on heavy objects and running. (Pr. 441-442). He reported that he could perform his job duties with only occasional shortness of breath. Claimant did not report any physical ailments involving his back or back pain. (Tr. 442-443). He informed Dr. Weill that he was being treated for high blood pressure. Claimant did not report his October 1, 1980 fall at work or becoming unconscious as a result of the fall. (Pr. 444; EX—5, pp. 5—6).

Dr. Weill testified that he again evaluated Claimant on February 4, 1985, at which time Claimant reported his February, 1983 lay off from Employer. He informed £hat he had not worked because of his shortness of breath and lower back pain. He related that he had been informed that he had two herniated lumbar discs. (Tr. 445; EX—5, pp. 1—2).

On cross-examination, Dr. Weill stated that in November, 1980, he probably did not specifically ask Claimant about any back injuries because he does not treat back injuries. (Tr. 450). However, he would have asked Claimant if he was able to do his job or if he had any symptoms, complaints or problems. (Tr. 452).

Dr. Russell Grunsten

Dr. Grunsten testified at the hearing that he retired in August, 1991 after 31 years of orthopedic practice. He was board certified as an orthopedic surgeon and accepted as an expert in his medical specialty.

Dr. Grunsten evaluated Claimant at the request of the Employe on June 28, 1984, for Claimant's complaints of back problems. (Tr 538, 542). Claimant related that he slipped and fell about 8-feet landing on his buttocks and felt a pop in his low back region He reported that "he laid there for a while." However, Claimant did not report loss of consciousness. (Tr. 546). He informed Dr. Grunsten that he continued to work until his lay off despite daily back discomfort. At the time of his lay off, his back was still hurting him with numbness in both legs. (Pr. 543). He related

his injection, need for a corset or brace and that his back hurts if he stands for a long time. (Pr. 544). Claimant did not relate his acute episode in August, 1983 when he had to go to the emergency room at West Jefferson Hospital. However, Dr. Grunsten remarked that such an episode is "always precipitated" by something whic exacerbates the symptoms. (Tr. 546).

On physical examination, Dr. Grunsten observed an inconsistency between the sitting and supine straight leg raising tests. He reviewed current x—rays which revealed narrowed discs at L4-5 and L5-S1, but could not opine whether the narrowing was caused by the injury or the disc injection. (Pr. 550—555). He also reviewed x-rays from October 17, 1980 and November 30, 198? before his disc injection, which revealed reasonably normal disc and spacing throughout the lower back. (Tr. 558). If any significant damage was caused as a consequence of trauma, such changes in the disc margins would have been observable according to Dr. Grunsten. He opined that the narrowing occurred after the injection and before the June, 1984 x—rays. Therefore, he concluded and opined that the disc space narrowing resulted from the disc injection. (Tr 558). Dr. Grunsten further opined that a chymopapaine injection, such as that received by Claimant, in designed to cause destruction of the disc substance to allow a settling." After the injection, he opined that there was a significant disc space narrowing or disc degeneration. (Tr. 560) Lastly, Dr. Grunsten testified that he did not use the injection treatment in his practice because of the high necessity for spin a fusion after the chymopapaine injection. (Tr. 561).

Hypothetically, Dr. Grunsten testified that it is extremely remote and not within reasonable medical certainty that there is a relationship between the 1980 injury and 1983 emergency room episode because of the three year span and day—to-day living and wear and tear on the spine. (Tr. 565). It was also Dr. Grunsten's opinion that Claimant's injury was a minor episode since it did not require hospitalization, impose long—term restrictions on activities or disable Claimant. (Tr. 566). He acknowledged that being taken off work for one week by Claimant's family doctor lends more magnitude to the episode. (Tr. 567). However, not voicing complaints of back problems when being examined by physicians for other complaints lends credence to the conclusion that the episode was only minor. (Tr. 568). However, a change in job status or duties lends more credence to the intensity of the 1980 injury. (Tr. 569).

Dr. Grunsten opined that in the absence of continued symptoms and medical treatment followed three years later by an episode of pain, two separate injuries/episodes in 1980 and 1983 occurred which are unrelated. (Tr. 573).

Dr. Grunsten testified that Claimant had a 10-15% impairment and could no longer engage in heavy manual labor. Claimant could perform sedentary to light work. • (Tr. 559).

West Jefferson Hospital Records

On August 1,1983, Claimant visited the emergency room with complaints of low back pain which "started last night." He reportedly denied injury as a cause of the acute

low back pain and denied numbness or tingling to the legs. Radiographic reports revealed the presence of osteoarthritis but otherwise a normal lumbo sacral spine. (EX-6(b)).

Dr. Robert A. Fleming

Dr. Fleming was deposed on three occasions by the parties. His first deposition was taken on April 19, 1994. (CX—23). He is board-certified as an orthopedic surgeon. (CX-23, p. 355). He testified that he first examined Claimant on August 23, 1983 after he had been seen in the emergency room of West Jefferson Hospital. (CX-23, p. 278). Claimant reported to him that he had slipped and fallen at work in 1980 and injured his lower back and had been treated for his pain by Avondale doctors. Dr. Fleming also examined Claimant's knee because of a report that he had a knee problem upon being recalled to work in March, 1983. Dr. Fleming concluded that Claimant had no knee problems. Id. After physical examination, Dr. Fleming opined that Claimant exhibited no objective evidence of a back injury *or* disability. (CX-23, p.281).

Claimant was treated conservatively until November 30, 1983, when he was admitted into West Jefferson Hospital for chemical surgery. (CX—23, p. 286-287). Dr. Fleming's working diagnosis was "probable herniated" L4-5 disc with right leg radiculitis based on complaints and objective findings. (CX—23, p. 285, 358). On December 2, 1983, a CAT scan revealed no abnormalities and only a mild posterior bulge in the intervertebral disc at L5-Sl. A myelogram disclosed an abnormal disc at L5—G, a transitional vertebrae. Otherwise, Claimant had normal

degenerative changes at L4—5 and L5—6. (CX-23, pp. 289—290, 293). On December 8, 1983, Claimant underwent a lumbar diskography at L4-5 and chemonucleolysis at L5-6. (CX—23, p. 294; CX—26, p. 709).

Dr. Fleming testified that the chymopapaine injection was designed to "chemically work on the nucleus pulposus" and to alleviate discomfort. As a result of the injection, Claimant reported no significant leg pain on January 3, 1984 in follow-up. Claimant achieved a good post—operative recovery and continued to exhibit no objective evidence of injury or disability according to Dr. Fleming. (CX-23, pp. 294-299). On April 24, 1984, Dr. Fleming opined that Claimant had objective evidence of injury or disability with degenerative changes and narrowing of the space at L4—5 and L5-6. (CX-23, p. 300). Such narrowing was also compatible with post—chemonucleolysis changes in the spine which were expected. (CX-23, pp. 300-301). Dr. Fleming testified that a sequelae of the injection is a "settling" of the joint. (CX —23, p. 358).

Dr. Fleming opined that by June 19, 1984, Claimant had reached maximum medical improvement with a 20% permanent partial impairment. (CX-23, pp. 295, 303-304). Claimant was to avoid heavy work and not engage in any repetitive bending, squatting, stooping, or climbing. He could occasionally bend, squat, stoop and climb. He could performed light to medium work, occasionally lift 40—50 pounds and repetitively lift 15—20 pounds. (CX—23, p. 296). Claimant was advised to use a "common sense" approach to activity. (CX- -23, p. 312).

Thereafter, Claimant was seen in follow—up on numerous occasions with no change in status and with no objective evidence of injury or disability. (CX—23, pp. 307—310, 315—328). By May 7, 1985, Claimant's permanent partial impairment had improved to only 15% with better anatomic findings. (CX—23, p. 314). By March 17, 1987, Claimant's physical examination was within normal limits and his back was feeling "very well" with medications. Dr. Fleming opined that Claimant could work eight hours per day, five days per week within his restrictions which remained the same. (CX-23, pp. 327—329). Claimant was seen every three or four months through December 22, 1987 with the same status and restrictions. (CX— 23, pp. 330—333) .

Claimant returned on July 18, 1991 and was seen by Dr. Klainer, an associate of Dr. Fleming, with his status unchanged

from December, 1987. Claimant reported feeling discomfort for one week before the July, 1991 visit. (CX—23, pp. 333—336). Claimant was seen on seven occasions through February 8, 1994, with reported good days and bad days, no significant changes and the same restrictions as announced in June, 1984. (CX-23, pp. 337—354).

Dr. Fleming stated that Claimant has degenerative changes which became symptomatic (from trauma according to the Claimant) which causes a nerve root problem. Since the disc injection, Claimant's degenerative disc problem is now worse because of the combination of the slip and fall and the injection. (CX—23, p. 361-362). Dr. Fleming opined that

Claimant's October, 1980 slip and fall could be the etiology of his complaints. However, there is a three year hiatus which Dr. Fleming noted from date of injury to his treatment of Claimant during which time he is without knowledge of Claimant's medical treatment or intervening events. He further opined that the slip and fall scenario fits with the claimed injury and is not unbelievable and is possible. (CX—23, p. 367). Dr. Fleming opined that, if there is no intervening trauma and Claimant's history of injury is truthful, it is more likely than not that his slip and fall caused his injury. (CX-23, p. 368). Dr. Fleming stated that Claimant should not be returned to work as a laborer. (CX-23, p. 375). He identified the "yellow pill" contained within Claimant's medication vial as Flexeril used for muscle spasm and pain. (CX—23, p. 369).

On June 20, 1995, Dr. Fleming was again deposed by the parties. (CX-2 4). Claimant returned for examination on August 15, 1994 with reports of intermittent pain but with no specific occurrence and no objective findings. Dr. Fleming stated that Claimant could then perform sedentary work. (CX—24, p. 397, 400— 401). Dr. Fleming testified that Claimant's subjective complaints of discomfort and pain are compatible with an individual who has a degenerative process in his lower back as a result of a combination of aging, injury and arthritis. (CX—24, pp. 407—408).

Based on Claimant's reports of pain in both legs on December, 12, 1994, a MRI was recommended to evaluate his lower back. On December 20, 1994, the MRI revealed an "osteophyte" at L5—S1 and degenerative disc disease at L4—5 and a congenital abnormality of a transitional

vertebrae at L5-6. (CX-24, p. 421). The MRI results represented objective evidence of Claimant's continued back complaints which were considered compatible with his 1980 fall as reported. (CX—24, pp. 470-471). Dr. Fleming opined that Claimant was no longer capable of alternative employment because of the subjective complaints of pain. (CX—24, pp. 418, 474). Dr. Fleming further opined that the "protrusion" impinged upon the nerve root and surgery was needed to relieved the pressure. (CX—24, p. 425). A lumbar laminectomy and fusion was subsequently performed at L4-5 and L5—S1 on March 30, 1995. (CX—24, pp., 43-435). Claimant would reach maximum medical improvement one year after back surgery and then have the capacity to perform light to medium work according to Dr. Fleming. (CX-24, pp. 436-437). Claimant can not return to sandblasting or hooking after the fusion surgery. (CX—24, p. 480). After reaching maximum medical improvement from his second surgery, Claimant should be able to perform "sedentary" work with alternate sitting and standing and occasional lifting of 20 pounds, but no repetitive bending, squatting, lifting or stooping. (CX—24, p. 483)

Dr. Fleming testified that the second surgery corrected Claimant's arthritic osteophyte but he did not find any evidence of a herniated or ruptured disc at L5-S1 as originally speculated. Claimant is the only patient who, after 12 years from chemical injection, returned requiring a second procedure. (CX-24, p. 490).

Based on a review of the alternative jobs found by Employer's vocational counselor, Dr. Fleming opined that as of August, 1994 and after reaching maximum medical

improvement in March, 1996, Claimant could perform the ticket taker job at the Superdome, the greeter jobs at Wal—Mart and Sam's if a break is received every 1—2 hours, the custodian job if no mopping or sweeping is required, and the gate guard jobs if allowed to alternately sit and stand. (CX24, pp. 402—403, 438).

On June 28, 1996, the parties once again deposed Dr. Fleming regarding his opinions expressed in a letter dated March 1, 1996. (EX-21). Dr. Fleming testified that he examined Claimant again on February 28, 1996 at which time he took a history. Claimant reported continued discomfort in his low back with restricted motion, but no significant leg pain. (EX-21, p. 7). Claimant's complaints of numbness and weakness in the right leg were not objectively established. (EX-21, p. 8). Radiographic films indicated Claimant had achieved a satisfactory spine fusion and anatomical result. (EX-21, pp. 11-12). Dr. Fleming opined that Claimant should reach 70-80% "good motion" and be able to perform sedentary activities. (EX-21, p. 15).

As of February 28, 1996, Claimant could perform work as a ticket taker at the Superdome, as a greeter at Wal—Mart or Sam's, as a gate guard where he could alternate sitting and standing and as a mail sorter if allowed to sit and stand at will. (EX—21, pp. 16-18). The foregoing work could be performed even if Claimant were taking Vicodin as a pain medication. (EX—21, p. 17). Claimant's restriction were the same as earlier stated except for a limitation of lifting no more than 15 pounds occasionally. Claimant would be allowed to return to work initially on a

trial basis of a half—day, five days a week for six weeks, before being allowed to work full—time. (EX-21, pp. 19-21).

Dr. David W. Aiken, Jr.

Dr. Aiken evaluated Claimant at the behest of Employer on February 21, 1995 and October 24, 1995. (EX—20). Claimant's chief
complaint was low back and bilateral leg pain. He reported good and bad days; four bad days a week. During physical examination, Claimant would not bend or flex beyond certain limits and complained bf lumbar pain with heel and toe walking. Straight leg raising caused low back pain on the right and left at 30 degrees.

Dr. Aiken opined that Claimant had a nearly solid fusion and appeared to be near maximum medical improvement. He concluded that Claimant should be able to perform light or sedentary work eight hours per day with severely restricted bending and lifting. Dr. Aiken did not expect Claimant's condition to change with the passage of time. (EX-20).

The Vocational Evidence

At the behest of Employer, Nancy Favaloro, a licensed vocational rehabilitation counselor, was contacted in January, 1994 to perform a vocational evaluation. (Tr. 464). On June 7, 1994. Claimant did not show up for an established interview, but rather his attorneys met with Ms. Favaloro to inform that Claimant was unemployable. (Tr. 466). On

September 15, 1994, Claimant met with Ms. Favaloro. (Tr. 468).

Ms. Favaloro was informed that Claimant was transferred from the crane department because of Claimant's lung problems. (Tr. 469). She determined that Claimant could not read or write and sought alternative employment which did not require such skills. (Pr. 470). In testing, Ms. Favaloro opined that Claimant presented inconsistently in that he could answer questions about his work duties and medical problems but professed not to understand test questions geared to an eight year old level. (Tr. 471-472).

Ms. Favaloro complied with Dr. Fleming's restrictions of Claimant in seeking jobs in a labor market survey. Such restrictions included lifting 15—20 pounds repetitively and 40—50 pounds ocdasionally with only occasional, but not repetitive, bending, stooping, climbing and squatting. (Pr. 474). She notei that Dr. Fleming discharged Claimant in February, 1984 but the... such physical restrictions remained in effect through December, 1994. (Tr. 475).

In January, 1995, Ms. Favaloro identified the following jobs which she opined were suitable for Claimant and within his physical restrictions: (1) a gate guard for Guardsmark which paid $5.15 per hour; (2) ticket taker position at the Louisiana Superdome which averaged 25 hours per week and paid $5.00 per hour; (3) a custodian position at Boomtown Casino which allowed a 15-20 minute break every 2 hours and required picking up glasses and napkins paing $5.25 an hour (4) a label and plate Netto

Graphics who checked the finished product t determine if the job was performed correctly based on the "shape of letters that paid minimum wage; and (5) greeter positions at Wal-Mart and Sam's which paid $4.50 and $5. 00—5.50 per hour, respectively. (Tr. 479—482). Ms. Favaloro testified that she mailed a February 10, 1995 letter to Claimant's attorney asking that he apply f or the foregoing jobs by February 21, 1995. Claimant did not apply f or any of the jobs.
(Tr. 482)

Ms. Favaloro testified that she also performed a retrospective job analysis for the period 1983 through 1991 and found jobs similar to the above jobs available but which paid $3.35 minimum wage or $3.85-4.25 per hour. (Tr. 491). A scdentary production job was available in 1983-1984 at Atlas Steel & Wire which paid $5.00 an hour. (Tr. 492). United Mail Sorters advertised a sorter position which allowed sorting by the size of documents and required no reading. (Tr. 493). Southern Microfilm offered a position taught through demonstration of microfilming documents, K & B Drugs offered a splicer job at $4.50-5.00 per hour and Hyatt Regency had a laundry washer attendant job that paid $4.O0-4.30 an hour. (Tr. 502—504).

Ms. Favaloro further testified that none of the foregoing jobs required pre-employment physicals to her knowledge. (Tr. 517—518). Although she informed the potential employers of Claimant's back injury and restrictions, shc did not relate his other physical problems related to his respiratory condition. (Tr. 523). She further stated that when she issued her Labor Market Survey in

February, 1995, she was unaware that Claimant was scheduled for back surgery in March, 1995. (Tr. 524). She indicated that all jobs were full-time positions except the part-time ticket taker position at the Superdome and there were no restrictions on the alternate sitting and/or standing eight hours per day. (Tr. 531).

The Contentions of the Parties

Claimant contends that he suffered an injury on October 1,
1980, which is supported by his testimony and the first aid records of Avondale. Thus, he has established the invocation of the Section 20(a) presumption. Moreover, Dr. Fleming has established a nexus between the accident and his 1983 injury because of the absence of any intervening causes.

Claimant argues that his claim is timely filed since he did not realize until August,1983, that his injury would impact upon his wage earning capacity which activates the statute of limitations under Section 13 of the Act. With respect to Section 12 timeliness, Claimant argues that Mr. Roberts received notice of his injury and thus Employer had knowledge and was not prejudiced by any alleged late filings. Claimant further argues that his filing of a claim on February 21, 1984, with the Louisiana State Workers' Compensation Office interrupts the time requirements under the Act. Claimant did not file his Claim for Compensation, LS-203, until June 24, 1992. (Tr. 68).

Claimant contends that he reached maximum medical improvement in June, 1984 after his chemical injection and

again on March 30, 1996 after his fusion surgery and that Claimant has been totally disabled from December 12, 1994 to present. Claimant argues that he is entitled to permanent partial disability for all other periods of time since he suffered a loss of wage earning capacity and all jobs identified through vocational efforts pay less than his former hourly wage.

Claimant also contends that he can not return to his former work as either a sandblaster or hooker, which he argues is sheltered employment, and therefore he is totally disabled. Claimant argues that since he has little education and is functionally illiterate, Employer has failed to present any suitable alternative jobs within the restrictions placed by Dr. Fleming which he can perform.

Employer contends that Claimant's version of his job accident and injury is not consistent and, even if believed, Claimant was released by his treating physician, Dr. Meyers, to return to work without restriction or permanent effects on October 31, 1980. Thus, Claimant reached maximum medical improvement on October 31, 1980. Thereafter, Claimant did not complain to first aid about any back problems or difficulties. Moreover, Claimant was examined by numerous doctors for other medical problems, including his lung problems f or which he was under medical surveillance, and did not complain about his alleged back problems. Employer submits that Drs. Mabey and Grunsten opined that there was no causation between Claimant's 1980 injury/accident and his August, 1983 back problems.

Employer argues that Dr. Fleming, who was not an authorized physician, did not support Claimant's case since Dr. Fleming was misinformed of the etiology of Claimant's pain in August, 1983. Moreover, it is further argued that Claimant's complaints were compatible with recent trauma not old trauma and the March, 1995 surgery was conducted because of arthritic changes and the degenerative process which is just as likely as trauma or residuals from the December, 1983 chemical injection. Dr. Fleming also approved several jobs found to be suitable for Claimant.

Employer contends that Claimant is incredible and his version of the facts should not be believed.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967). However, the United states Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, U.S., 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well—settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw

his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards. Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc, and Hartford Accident & Indemnity Co. v. Bruce, 551 F. 2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association. Inc., 390 U.S.459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Prima Facie Case

Section 20(a) of the Act, 33 U.S.C. Section 920(a), creates a presumption that a claimant's disabling condition is causally related to his employment. In order to invoke the Section 20(a) presumption, a claimant must prove that he suffered a harm and that conditions existed at work or an accident occurred at work that could have caused, aggravated or accelerated the condition. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990).

Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS (5th Cir. 1982).

In the present matter, it is clear that Claimant suffered a physical harm and pain. I find Claimant's basic description of his accident, slipping and falling from a ladder to be credible and consists of the type of activity which

constitutes working conditions that can cause or comprise an accident. Avondale's first aid records demonstrate that Claimant reported his accident on October 1, 1980 and his physical complaints of pain and harm. (CX-26, pp. 634-635). He was provided pain medication which did not relieve his pain. He subsequently complained of radicular pain into the back of his legs which was aggravated by his bending activities as a crane hooker. He was placed on light duty of no heavy lifting or excessive bending which was not available. (CX 26, p. 635). On October 24, 1980, Dr. Meyers diagnosed Claimant with sciatica secondary to direct trauma. (CX-26, p. 635).

Thus, Claimant has established a prima facie case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on October 3 1980, and that his working conditions and activities on that date could have caused the harm
or pain for Causation sufficient to invoke the Section 20(a) presumption. Cairns V. Matson Terminals. Inc., 21 BRBS 252 (1988).

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that Claimant's employment did not cause, contribute to or aggravate his condition. James v. Pate Stevedoring Co., 22 BRBS 271 (1989); Peterson v. General Dynamics Corp., 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. E & L Transport Co. v. N.L.R.B., 85 F.3d 1258 (7th Cir. 1996).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith V. Sealand Terminal, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. Hampton
v. Bethlehem Steel Corp., 24 BRBS 141, 144 (1990).

Employer has failed to introduce sufficient evidence demonstrating that Claimant did not suffer physical harm or pain or that working conditions or an accident did not cause Claimant's underlying back condition.

Accordingly, I find that Claimant has established a prima facie case of a physical harm or pain and working conditions which could have caused it. Therefore, Claimant has established that he suffered an "injury" as defined by the Act on October 1, 1980.

B. Statute of Limitations

SECTION 12 NOTICE

Section 12 provides that in order to preserve his rights under the Act, a claimant must give timely notice of a compensable injury. Section 12(a) provides that a notice of injury f or which compensation is payable must be given within 30 days after the date of the injury or within 30 days

after the employee is aware or, in the exercise of reasonable diligence, should have been aware of a relationship between the injury and his employment.

Failure to give notice under Section 12(a) will bar a claim unless Section 12(d) applies. Pursuant to Section 12(d), the
failure to file timely notice will not bar the compensation claim if (1) the employer, carrier or designated official has actual knowledge of the injury; (2) a determination is made that the employer or carrier has not been prejudiced thereby; or (3) the claimant's failure to file a timely notice is excused.

I find, based on the credible and undisputed testimony of Claimant, as Corroborated by Employer's first aid records, that he orally reported his job accident and injury on October 1, 1980 to foreman Nellie Bertrand and to first aid. Employer so acknowledged notice in its first report of injury. (CX-3). Having so found, I conclude that the Employer had knowledge of Claimant's oral notification of injury and the work relatedness of the injury on October 1, 1980. See Matthews v. Jeffboat, Inc., 18 BRBS 185 (1986). Moreover, Employer has produced no evidence that it has been prejudiced by Claimant's failure to provide written notice as required by Section 12(b) such as an inability to effectively investigate to determine the nature and extent of the injury or to provide medical services. See Boyd v Ceres Terminals, 30 BRBS 218
(1997)

SECTION 13 CLAIM

Section 13(a) provides that the right to compensation for disability shall be barred unless the claim is filed within one year from the time the claimant becomes aware, or should have been aware of the relationship between the injury and his employment. If payment of compensation is made without an award, a claim may be filed within one year after the date of the last payment.

Upon being released by Dr. C. J. Meyers, Claimant returned to work until February 4, 1983, when he was laid of f for reasons unrelated to his injury. Although he claims to have worked in pain, no longshore claim for compensation was filed.

Employer voluntarily paid compensation to Claimant for the period from October 28, 1980 through November 3, 1980, in the amount of $205.38. (CX—2). On November 6, 1980, Employer filed its First Report of Injury, Form LS-202, concerning Claimant's October 1, 1980, accident/injury and within 10 days of the Claimant's loss of work time pursuant to Section 30(a) of the Act. (CX-3). In December, 1980, OWCP received Employer's Notice of Final Payment or Suspension of Compensation Payments, Form LS—208, ref lecting the date of last payment was made on November 10, 1980. (CX-5). No longshore claim was filed within one year from the date of last payment of compensation.

Employer asserted its right at the hearing to object to the failure to file a claim in a timely fashion, therefore there has been no waiver under Section 13(b).

On August 23, 1983, Claimant learned of his "probable" herniated disc condition and potential need for surgery which Dr. Fleming attributes to his October, 1980 job accident based on Claimant's reported history.

The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has recognized that the time for filing a claim under Section 13(a) does not commence to run until the claimant knows or has reason to know that his injury is likely to impair his earning capacity. See Marathon Oil Co. V. Lunsford, 733 F.2d 1139, 1141, 16 BRBS 100 (CRT)(5th Cir. 1984). Accord Newport News Shipbuilding and Dry Dock Company v. Parker, 935 F.2d 20, 25 (4th Cir. 1991). Thus, Claimant's date of awareness is the crucial date to consider for purposes of Section 13.

In conjunction with the foregoing, a claimant is not "aware" under Section 13 until he knows of the full character, extent and impact of his injury. Welch v. Pennzoil Co., 23 BRBS 395 (1990).

Accordingly, using the above decisional rationale as a guideline, I find that Claimant first began to appreciate the extent of his back injury on August 23, 1983, when he became aware of the "full character, extent and impact" of his back injury which adversely affected his wage-earning capacity. Thus, Claimant's date of awareness is August 23, 1983.

On February 21, 1984, Claimant filed a Petition for Workmen's Compensation pursuant to the State of Louisiana

Workmen's Compensation Law for his October 1, 1980, back injury. (CX—8). The Louisiana Workmen's Compensation Statute provides an absolute two year period from date of injury within which to file a claim. Claimant's petition was clearly untimely when filed. On October 2, 1991, the Louisiana Supreme Court declined to review an appellate court ruling dismissing Claimant's petition. (CX—18). On November 6, 1992, the Louisiana Supreme Court denied Claimant's Motion for Reconsideration. (CX-18).

In Ingalls Shipbuilding Division, Litton Systems. Inc. v. Hollinhead, 571 F.2d 272, 8 BRBS 159 (CRT) (5th Cir. 1978), the Fifth Circuit held under Section 13(d) of the Act that the filing of a state workman's compensation claim tolled the one year Section 13(a) statute of limitations during the time of its pendency. In Hollinhead, a claim under the Act filed on August 7, 1973, thirteen months after a July 5, 1972 injury, was timely because of the pendency of a state workmen's compensation claim filed on January 22, 1973 and withdrawn on May 1, 1973. Thus, the filing suspended or tolled the running of the one-year statute of limitations for a three and one-half month period under the Act.

Here, Claimant's state workmen's compensation claim suspended the statute of limitations from February 21, 1984 until October 2, 1991, a period of seven years and eight months. Claimant thereafter filed his claim for compensation on June 24, 1992, eight and one-half months after the Supreme Court's affirmation of his denied state claim. On some unknown: date, Claimant filed a Request for Reconsideration which brought hid. state claim to administrative finality on November 6, 1992. Obviously,

Claimant appreciated the urgency to file his claim even though his reconsideration was presumably still pending on June 24, 1992. Thus, from the date of awareness, August 23, 1983 to February 21, 1984, when Claimant's state claim was filed, six months of the one-year statute of limitations ran. After October 2, 1991, an additional seven and one-half months transpired before Claimant filed the instant claim, a period of 13-1/2 months. Thus, Claimant failed to file his claim for compensation timely under the Act.

In Hollinhead, the Fifth Circuit did not analyze or discuss the reason why Hollinhead's petition for workman's compensation was withdrawn. The Benefits Review Board in Calloway v. Zigler Shipyards, Inc., 16 BRBS 175 (1984) concluded that the law in the Fifth Circuit, based on Hollinhead, is to disregard, as irrelevant, the grounds upon which recovery is denied in a suit brought at law. Although Hollinhead has been cited sporadically in the Fifth Circuit, the Court has not proscribed as irrelevant the review of the basis for denial of a state workmen's compensation claim contrary to the Board's view.

Here, Claimant's state petition was denied as untimely which I find to be extremely germane to the facts presented herein. Claimant's February 21, 1984 claim was clearly untimely. Claimant could have elected to file a claim under the Act which arguably would have been within one year of Claimant's date of awareness. I find it illogical and absurd to permit the untimely filing of a state claim to suspend or toll the statute of limitations for a longshore claim as here which is also ultimately untimely filed. In essence, to permit such a tolling in this case allows Claimant to bootstrap

himself into an extension of the one—year statute of limitations. For this additional reason, I find Claimant's June 24, 1992 claim to be untimely.

Contrary to the Claimant's argument, only a timely filed claim remains open until a formal award is issued. See Intercounty çonstruction Co V. Walker, 422 U. S. 1, 2 BRBS 3 (CRT) (1975); O'Berry v. Jacksonville Shipyards. Inc., 21 BRBS 355 (1988). Although a letter to the District Director from which it may be reasonably inferred that a claim for compensation is being made can be sufficient to constitute a claim, no such evidence exists in this record, notwithstanding Counsel for Claimant's correspondence to Employer demanding payment of compensation on November 8 and 17, 1983. (CX6). See Bingham V. General Dynamics Corp., 14 BRBS 614 (1982); Paquin v.. General Dynamics/Electric Boat Division, 4 BRBS 383 (1976)

Accordingly, based on the foregoing, I find and conclude that claimant's claim for compensation under the Act was untimely filed and therefore must be denied.

In view of this finding and conclusion, it is unnecessary to treat the remaining substantive issues of nature and extent of Claimant's disability, including the sub—issues of maximum medical improvement and suitable alternative employment.

C. SECTION 7 MEDICAL BENEFITS

In Strachan Shipping Co. v. Hollis, 460 F.2d 1108, 1116 (5th

Cir. 1972), cert. denied 409 U.S. 887, 93 S.Ct. 114 (1972), the
Fifth Circuit determined, despite the applicability of Section 13(a) with regard to an employee's claim for compensation benefits, Employer has a continuing obligation to furnish medical care with respect to disabilities flowing from a work-related accident. See Ryan v. Alaska Constructors, Inc., 24 BRBS 65 (1990); Slier V. Dillingham Ship Repair, 28 BRBS 38 (1994).

Thus, a claimant's entitlement to medical benefits is never time—barred if he has suffered a compensable injury as in the instant case. Aurelio v.Louisiana Stevedores. Inc., 22 BRBS 418 (1989), aff'd. men. No. 90—4135 (5th Cir. March 5, 1991) (unpublished). See Marshall v. Pletz, 317 U.S. 383 (1943) (payment of medical benefits is not payment of compensation within the meaning of Section 13 and, therefore, the payment of medicals will not toll Section 13).

Inherent in the foregoing findings related to Claimant's awareness of disability is a conclusion that the 1983 emergency room episode followed by treatment from Dr. Fleming is connected to Claimant's 1980 job accident/injury. I am not persuaded by Employer's argument that a notation in the West Jefferson Hospital emergency room notes that Claimant "denies injury," without further explication, is determinative of a lack of nexus to Claimant's 1980 injury. Claimant disputed the notation if it did not include his report of job injury to his back in 1980.

Although I find that Claimant did not seek continuous medical treatment and medication from Avondale

first aid from November, 1980 through February 4, 1983, I do not find it implausible, particularly in the absence of an intervening trauma, that Claimant could suffer an acute episode of back symptoms in 1983. Dr. Fleming so testified.

Moreover, contrary to Employer, I am not impressed by Claimant's lack of back complaints to physicians who evaluated his heart or respiratory conditions. Claimant is not a sophisticated individual and I do not find it extraordinary that he failed to mention his back condition without specific prompting or questioning.

Employer presented the opinions of Dr. Mabey and Dr. Grunsten in support of its argument that the 1980 job injury did not cause the 1983 exacerbation of back symptoms. Although Dr. Grunsten's comparative review of x—rays was persuasive, he did not review the CAT Scan or myelogram conducted in December, 1988 before the chemical surgery, as did Dr. Fleming, which revealed a mild posterior bulge at L5-S1 and an abnormal disc at L5—6 and degenerative changes at L4-5 and L5-6. The foregoing was the basis for Dr. Fleming's lumbar diskography and chemonucleolysis. Dr. Mabey's opinion was not based on any diagnostic or scientific testing or review.

Employer failed to introduce any other reason for Claimant's exacerbated back symptoms. Dr. Fleming opined that the connection between Claimant's 1980 job injury and his 1983 episode is not unbelievable and is possible. I found Dr. Fleming's opinions reasoned, based on supportive diagnostic testing, and therefore place more weight and credence thereon. As Claimant's treating physician, Dr.

Fleming examined Claimant more frequently and more copiously than consultative physicians, and treated Claimant's symptoms and managed his care for an extended period of time. Therefore, I find and conclude that Claimant's 1983 symptoms were related to his 1980 job injury and that the compensability of such injury extends to his 1983 medical treatment and its sequelae which extends to the 1995 surgery.

I find that Counsel for Claimant's letters to Employer of November 8 and 17, 1983, constitute demands for authorizations of medical treatment. Employer's failure or refusal to authorize medical treatment releases Claimant from the obligation to seek approval for his subsequent treatment and thereafter needs only to establish that the treatment he subsequently procured was reasonable and necessary for his injury to be entitled to treatment at Employer's expense. Schoen v. United States Chamber of Commerce, 30 BRBS 112, 113 (1996) and cases cited thereat; Caudill v. Sea Tac, Alaska Shipbuilding, 25 BR.BS 92 (1991). I find the treatment provided by Dr. Fleming to be both reasonable and necessary for which Employer is responsible and liable.

Thus, although I have concluded that Claimant's claim for compensation is barred by his failure to file a timely claim, a claimant is always entitled to medical treatment if he has suffered a compensable injury as in the instant case. Colburn v. General Dynamics Corp., 21 BRBS 219 (1988). Therefore, Employer will be ordered to reimburse Claimant for any medical expenses incurred and to pay all reasonable, appropriate and necessary medical expenses arising from

Claimant's October 1, 1980 work injury as a result of seeking medical treatment in August, 1983 and thereafter.

ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that' service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law,and upon the entire record, I enter the following Order:

1. Claimant's claim for compensation is DENIED as untimely filed pursuant to Section 13(a) of the Act.

2. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's October 1, 1980, work injury, and its sequelae, pursuant to the provisions 2f Section 7 of the Act.

3. Claimant's attorney shall have thirty (30) days from date of service by the District Director to file a ful].y supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 2d day of July, 1997, at Metairie, Louisiana.

LEE J. ROMERO, JR
Administrative Law Judge

Footnotes

[1]References to the transcript and exhibits are as follows:

Transcript: Tr._; Claimaint's Exhibits: CX-_; and Employer Exhibit:EX-_; and Joint Exhibit: JX-_.

No. 99-1342

IN THE

Supreme Court of the United States

GEORGE HILL,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and AVONDALE INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AVONDALE INDUSTRIES, INC.

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit correctly held that an untimely, perempted claim for Louisiana Workers' Compensation benefits does not toll the statute of limitations for filing a claim pursuant to the Longshore and Harbor Workers' Compensation Act.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Avondale Industries, Inc., is a wholly owned subsidiary of Litton Industries Inc. which is publicly traded.

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STATEMENT OF THE CASE

On June 24, 1992, Petitioner, George Hill, filed a claim for compensation and medical benefits pursuant to the Longshore and Harbor Workers' Compensation Act against Respondent, Avondale Industries, Inc., for an alleged back injury sustained approximately twelve years earlier on October 1, 1980.

Following the alleged accident and injury of October 1, 1980, Hill's first legal action was to file a petition in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, on February 21, 1984, alleging entitlement to workers' compensation benefits pursuant to the Louisiana Workers' Compensation Act. The Louisiana Workers' Compensation Act provides, in all cases, "the claim for payment shall be *forever barred* unless the proceedings have been begun within two years from the date of the accident." (emphasis added). La. R.S. 23:1208.2. Accordingly, Respondent asserted that the claim was time-barred and, on June 26, 1991, the Louisiana district court dismissed the claim for compensation pursuant to Louisiana law. Petitioner appealed to the Louisiana Fifth Circuit Court of Appeals which affirmed the judgment of the district court with written reasons on February 25, 1992. On October 2, 1992, the Louisiana Supreme Court unanimously denied Petitioner's writ of certiorari and/or review, and on November 6, 1992, Petitioner's application for reconsideration was also unanimously denied by the Louisiana Supreme Court.

It was not until June 24, 1992, and approximately 12 years post-accident, that Petitioner filed his claim for compensation pursuant to the Longshore and Harbor Workers' Compensation Act. The claim for compensation proceeded to formal hearing on February 8-9, 1996, and the Administrative Law Judge denied Petitioner's claim

for compensation as untimely filed pursuant to 33 U.S.C. § 913(a). Petitioner was awarded medical benefits pursuant to 33 U.S.C. § 907.

The only ruling of the Administrative Law Judge which has been made subject of Petitioner's appeals or applications for post-judgment relief is the ruling that his claim for compensation, filed more than 12 years post-accident, was untimely pursuant to § 913(a).

The decision and order as outlined above by the Administrative Law Judge was appealed to the Benefits Review Board on July 2, 1997. On August 4, 1998, the Board affirmed the Administrative Law Judge's ruling that Petitioner's claim for longshore compensation pursuant to the Longshore and Harbor Workers' Compensation Act was time barred under 33 U.S.C. § 913(a). Petitioner subsequently appealed to the United States Court of Appeals for the Fifth Circuit, which also affirmed that Petitioner's claim for compensation was time barred pursuant to § 913(a). Petitioner now seeks consideration from this Court of issues which, for the following reasons, have no merit and should not be addressed.

REASONS FOR DENYING THE WRIT

As admitted by Petitioner, at the time he decided to pursue a remedy for his alleged accident and injury pursuant to a workers' compensation scheme, there was a dual remedy available to him, i.e., he had the option of filing pursuant to either the Louisiana Workers' Compensation Act or the Longshore and Habor Workers' Compensation Act. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S. Ct. 2432, L. Ed. 2d 458 (1980). In fact, Petitioner could have

simultaneously filed both claims.[1] Despite this freedom of choice, Petitioner chose not to seek a remedy pursuant to Longshore and Harbor Workers' Compensation Act, and instead chose to file only a claim pursuant to the Louisiana Workers' Compensation Act. However, for unexplained reasons, Petitioner failed to file the state workers' compensation claim within the clear and expressed two year peremptive period provided by Louisiana law. La. R.S. 9:23:1209(A); *Ancor v. Belden Concrete Products, Inc.*, 256 So. 2d 122 (La. 1971) (held: the two year period provided by La. R.S. 23:1209(A) is a peremptive period). In Louisiana law, a lapse of the peremptive period operates as a complete extinguishment of the cause of action such that there is no substantive right which exists to be enforced. *Equilease Corp. v. M/V SAMPSON*, 756 F.2d 357 (5th Cir. 1985); *KSLA-TV, Inc. v. Radio Corp. of America*, 732 F.2d 441 (5th Cir. 1984). Because a peremptive period sets forth the time period that a right exists to be enforced, "the right is extinguished upon the expiration of the peremptive period" and the "cause of action or substantive right no longer exists to be enforced." La. Civ. Code art. 3458; *Ancor*, 256 So. 2d at 381; *Pounds v. Schori*, 377 So. 2d 1195, 1198 (La. 1979).

Based upon the foregoing, Petitioner's right to be file a claim pursuant to the Louisiana Workers' Compensation Act was extinguished prior to the filing of his claim. Thus, there was no right to be enforced, and upon filing, there was no reason for Respondent to address the merits of the claim.

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1. Just prior to his alleged back injury, Petitioner filed suit against Respondent for an alleged occupational lung disease claim in Louisiana state court and simultaneously pursued a claim under the Longshore and Harbor Workers' Compensation Act. Accordingly, Petitioner was well aware of the remedies available to him.

It is undisputed that Petitioner's claim pursuant to the Longshore and Harbor Workers' Compensation Act was not filed until June 24, 1992, roughly twelve years post-accident. Thus, standing alone, the Longshore and Harbor Workers' Compensation Act claim was time barred pursuant to 33 U.S.C. § 913(a). Petitioner argues that the one year limitation should be tolled by virtue of § 913(d), which provides:

> Where recovery is denied to any person in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time . . . shall begin to run only from the date of termination of such suit.

Petitioner argues that despite the fact that his claim for compensation pursuant to the Louisiana Workers' Compensation Act was *untimely* and *without legal effect*, it should operate to toll the statute of limitations pursuant to §§ 913(a) and (d). Thus, Petitioner argues that any earlier filed claim of any nature or kind should operate to toll the statute of limitations as set forth in § 913(a) provided that such earlier filed claim or lawsuit was brought within the statute of limitations provided by § 913(a). Absolutely no authority exists for such an interpretation, and in fact, that interpretation is contrary to the plain language of the statute and would be in complete contravention to the basic purpose of the tolling provision.

I.

THE PLAIN LANGUAGE OF 22 U.S.C. § 913(b) RENDERS IT INAPPLICABLE TO THE INSTANT CASE

According to the *plain* and *unambiguous* language of § 913(d), the limitation period contained in § 913(a) is only tolled when certain conditions are met, i.e.: (1) a suit must have been brought at law or in admiralty to recover damages; (2) recovery must have been denied; and (3) the denial must have been "*on the ground*" that the claimant was an employee and the defendant was an employer within the meaning of the Longshore and Harbor Workers' Compensation Act and that the defendant had secured compensation benefits to such employee pursuant to the Longshore and Habor Workers' Compensation Act. 33 U.S.C. § 913(d).

"Congress intends the words of its enactments to carry their ordinary, contemporary, common meaning." *United States v. Gray*, 96 F.3d 767, 774 (5th Cir. 1996). The statute itself is the "sole repository of congressional intent where the statute is clear and does not demand an absurd result." *In Re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995), *citing West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 99-100, 111 S. Ct. 1138, 1147, 113 L. Ed. 2d 68 (1991). Congress could have provided that the one year statute of limitation contained in § 913(a) is tolled at any time a suit is brought at law or in admiralty for recovery or damages; however, it chose not to do so. Congress went on to delineate, with specificity, that the tolling provision was *only* applicable when a denial of recovery of damages is based upon a defendant's statutory immunity pursuant to the Longshore and Harbor Workers' Compensation Act.

This makes total sense. In a precautionary suit at law or in admiralty, the defense of the defendant will be statutory immunity pursuant to the Longshore and Harbor Workers' Compensation Act. The defendant will then be urging its statutory immunity pursuant to the Longshore and Habor Workers' Compensation Act and conceding that the merits are to be addressed by a claim pursuant to that Act.

Since Petitioner's state workers' compensation claim was dismissed on grounds of peremption, *i.e.*, that the right no longer existed at the time of filing, it was not a denial of recovery due to the exclusivity of the Longshore and Harbor Workers' Compensation Act. Thus, the § 913(d) tolling provision does not apply.

II.

THE PEREMPTED STATE WORKERS' COMPENSATION CLAIM CANNOT SERVE TO TOLL THE ONE YEAR STATUTE OF LIMITATIONS PURSUANT TO 33 U.S.C. § 913(d)

Petitioner argues that even the filing of a claim based upon a right that does not even exist serves to toll the one year limitations provided by the Longshore and Harbor Workers' Compensation Act. There is no support for this interpretation, and Petitioner's interpretation contravenes the purpose and policy of statutes of limitation as well as the purpose of tolling provisions pursuant to federal law.

No court has ever held that an *untimely* state law claim can serve as a basis to toll the applicable statute of limitations on a similar, or even identical, federal law claim. *See, e.g., Drumm v. Sizeler Realty Co., Inc.*, 817 F.2d 1195

(5th Cir. 1987) (held: an untimely lawsuit in Louisiana state court pursuant to Louisiana antitrust law could not operate to toll the statute of limitations for a federal lawsuit, later brought in federal court, based upon federal antitrust law). To hold that an untimely claim is sufficient would contravene the purpose and policy of all statutes of limitation as set forth by this Court and all others to have addressed the issue. When the underlying state law claim is *untimely*, there is no need or impetus for the defendant to gather evidence and investigate the merits of the claim. The defendant then only needs to address the timeliness of the state law claim and have it dismissed on that basis, especially when clearly and expressly governed by a peremptive period which is not subject to tolling, suspension or interruption.

In the instant case, Petitioner's remedy pursuant to the state workers' compensation scheme was extinguished by his own inaction. He had no right under Louisiana law to file the petition. Due to the absolute loss of the right, the petition was untimely as a matter of law, and Respondent had no impetus to investigate the claim and gather evidence in its defense.

Since Petitioner's position is contrary to the purpose of statutes of repose, he makes a "last-ditch" attempt by arguing that the Fifth Circuit deprived him of "his Constitutional rights by retroactively changing its application of the law." As set forth below, there is no merit to this argument.

Petitioner claims that there was "well established jurisprudence" which provided that his untimely state compensation claim would toll the statute of limitations set forth in § 913(a). Petitioner cites *Ingalls Shipbuilding Div., Litton Systems, Inc. v. Hollinhead*, 571 F.2d 272 (5th Cir.

1978) and *Calloway v. Zigler Shipyards, Inc.*, 16 B.R.B.S. 175, 177 (1984) as this "well established jurisprudence." However, these cases are easily distinguishable. In *Hollinhead*, the only issue was whether a *timely* workers' compensation claim qualified to toll the applicable statute of limitations. *Hill*, 195 F.3d 790, 793. Likewise, in *Calloway*, the plaintiff's first attempt to receive benefits, via an admiralty suit, was *timely*. Thus, Petitioner's argument that the foregoing jurisprudence constituted a clear rule of law applicable to the instant case has no merit. There was no jurisprudence even suggesting that an untimely and perempted state compensation claim tolls the applicable limitations period. Thus, there was no retroactive change in the law which could even arguably amount to a deprivation of a Constitutional right.

Petitioner further argues that his position is necessary to achieve uniformity. There is likewise no merit to that argument. Petitioner asserts that the timeliness of the underlying state claim should not be considered in application of § 913(d)'s tolling provision because to do so would render "harsh and incongruous" results. Petitioner suggests that any claim or suit should be sufficient to toll the statute of limitation if it is filed within the time prescribed by § 913(a). This unsupported theory would lead to absurd results.

There is often doubt whether the Longshore and Harbor Workers' Compensation Act covers an employee, and that determination is often a very close call. Accordingly, a claimant could have a good faith belief that he is a Jones Act seaman and could file a Jones Act lawsuit which carries a statutory three year limitations period. If the claimant files a Jones Act lawsuit two or even three years post-accident

and loses the issue of seaman's status due to a jury's determination that plaintiff is a longshoreman, then under Petitioner's rationale, he would be forever barred from asserting a claim pursuant to the Longshore and Harbor Workers' Compensation Act since the Jones Act suit was not brought within one year of the date which he became aware of his disability. This result would necessarily superimpose § 913(a)'s statute of limitations upon every legal remedy which could arguably provide a basis for recovery to the claimant. This could not have been the intent of § 913(d).

If Congress had intended such a result, it could have easily stated in § 913(d) that any suit shall toll the prescriptive period if brought within the time prescribed by § 913(a). Congress chose not to do so for obvious reasons.

Petitioner makes issue of what he considers to be a harsh and incongruous result. However, Petitioner fails to realize that there was no impediment to his asserting a claim pursuant to a Longshore and Harbor Workers' Compensation Act. As Petitioner admits in brief, he had the option of pursuing claims pursuant to either state compensation law or the Longshore and Harbor Workers' Compensation Act. He could have also simultaneously filed both claims. For whatever reason, strategic, tactical or otherwise, plaintiff chose to proceed pursuant to state law. It was only once Petitioner was cognizant of his lack of diligence and mistake of applicable law, that he elected to pursue a LHWCA claim. This lack of diligence, as the Fifth Circuit correctly held, should not be rewarded.

CONCLUSION

For the foregoing reasons, the Petition for Writ of certiorari should be denied. Petitioner has not raised any issue worthy of consideration by this Court. There was no deprivation of Constitutional rights, and the results of the lower courts are completely consistent with applicable law and the clear intent of Congressional enactments. Petitioner is simply seeking to redress his mistakes at the extreme expense of defendant which according to all lower courts, is absurd.

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No. 99-1342

In the Supreme Court of the United States

GEORGE HILL, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a claim for state workers' compensation benefits that is dismissed on the ground that it was untimely filed under state law tolls the statute of limitations for filing a claim for benefits under the Longshore and Harbor Workers' Compensation Act.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-9a) is reported at 195 F.3d 790. The decision and order of the Benefits Review Board (Pet. App. 10a-30a), and the decision and order of the administrative law judge (Pet. App. 31a-76a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1999. The petition for writ of certiorari was filed on February 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* Pet. App. 32a. Petitioner injured his back on October 1, 1980, while working as a sandblaster for Avondale Shipyards, Inc. (Avondale). *Id.* at 2a, 11a. After receiving disability benefits from Avondale for one week, petitioner returned to his sandblasting position. *Ibid.* In mid-November 1980, Avondale transferred petitioner to a position in which he performed crane hooking. He remained at that position until he was laid off in March 1983. *Id.* at 2a-3a, 11a. In August 1983, petitioner was diagnosed as having two bulging discs. He underwent corrective surgery to alleviate that condition in late 1983 and again in 1995. *Id.* at 3a, 11a-12a.

On February 21, 1984, petitioner filed a claim for benefits under the Louisiana workers' compensation statute in connection with his disc condition. The Louisiana state court denied the claim as time-barred under a state-law provision (La. Rev. Stat. Ann. § 23:1209.A (West 1998)) requiring that a claim be filed within two years of the "accident." Pet. App. 3a, 8a, 69a. Petitioner appealed, but the state appellate court affirmed. The Louisiana Supreme Court declined review on October 2, 1992, and denied reconsideration on November 6, 1992. *Id.* at 3a.

2. On June 24, 1992, petitioner filed an administrative claim for compensation under the LHWCA. Pet. App. 69a. A hearing was held before a Department of Labor Administrative Law Judge (ALJ), who issued a

decision and order on July 2, 1997, denying compensation benefits but granting medical benefits. *Id.* at 75a.[1]

The Benefits Review Board (the Board) affirmed.[2] Pet. App. 10a-30a. The Board held that, while the filing of a timely state claim for workers' compensation tolls the one-year statute of limitations for filing a claim under the LHWCA, the filing of an untimely state claim does not. *Id.* at 22a The Board acknowledged that prior decisions applying the LHWCA had indicated that the pendency of another claim tolls the statute of

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[1] The ALJ based its decision regarding compensation benefits on three findings: (1) that petitioner's time for filing a claim under the LHWCA began to run when his disc condition was first diagnosed on August 23, 1983 (Pet. App. 68a); (2) that the statute of limitations for filing an LHWCA claim was tolled by Section 13(d) of the Act (33 U.S.C. 913(d)) during the pendency of petitioner's state claim (Pet. App. 68a-69a); and (3) that petitioner waited eight and one-half months after the completion of his state case before he filed his LHWCA claim, bringing the total elapsed time for statute of limitations purposes to more than the permissible one year. *Id.* at 69a-70a.

[2] In affirming, the Board rejected much of the ALJ's reasoning. The Board held that if petitioner's state claim had been timely filed, then under Section 913(d) of the LHWCA, 33 U.S.C. 913(d), the statute of limitations would not have begun to run until the completion of petitioner's state case. Thus, it reasoned, the ALJ was incorrect to hold that six months of the LHWCA's limitations period had run before petitioner filed his state claim. Pet. App. 20a. Moreover, the Board found that petitioner had not in fact waited eight and one-half months after the completion of his state case before filing his LHWCA claim. The Louisiana Supreme Court denied review of petitioner's state-law claim on October 2, 1992 (three and one-half months after petitioner filed his LHWCA claim), not, as the ALJ had thought, on October 2, 1991. *Id.* at 19a. Thus, because the Board rejected the ALJ's reasoning, it is the Board's decision—and the court of appeals' affirmance of it—that is at issue here.

limitations under the LHWCA, *id.* at 20a-22a (citing *Ingalls Shipbuilding Div., Litton Sys., Inc.* v. *Hollinhead*, 571 F.2d 272 (5th Cir. 1978) (per curiam), and *Calloway* v. *Zigler Shipyards, Inc.*, 16 Ben. Rev. Bd. Serv. (MB) 175 (1984)), but it distinguished those cases as not addressing state claims that are untimely under state law. *Id.* at 22a. The Board further noted that in this case, twelve years had elapsed between the date of the accident and the date on which petitioner filed his LHWCA claim. *Id.* at 23a. Reasoning that Avondale would be substantially disadvantaged by having to defend against a "stale claim," the Board agreed with the ALJ that it would be "illogical to allow an untimely filed state claim to toll the time for filing a claim under the Act." *Id.* at 23a-24a. "To hold otherwise," the Board concluded, "would not only defeat the purpose for establishing statutes of limitations but would reward [petitioner] for filing two delinquent claims." *Id.* at 24a.

3. The court of appeals affirmed. Pet. App. 1a-9a. Like the Board, the court of appeals distinguished this case from its prior decision in *Hollinhead*. The court explained that the issue in *Hollinhead* was not whether an untimely state claim triggers the tolling provision, but whether a state workers' compensation claim is a suit "at law or in admiralty to recover damages" within the meaning of Section 13(d) of the LHWCA, 33 U.S.C. 913(d). Pet. App. 5a. Similarly, the court distinguished the Board's decision in *Calloway*, which likewise involved a timely predicate suit under the Jones Act *Id.* at 5a-6a. In contrast to those cases, the court reasoned that "[t]o allow [petitioner's] untimely LHWCA claim to piggy-back on a prior stale claim would be an abuse of § 913(d)'s tolling provision and would subvert the purpose of statutes of limitation[s] * * * to provide

fairness to defendants and to afford plaintiffs a reasonable period of time within which to present their claims." *Id.* at 6a (citation omitted). And the court agreed with the Board that to allow petitioner's LHWCA claim to proceed when he initiated it so many years after the date of his injury would put Avondale at a "substantial disadvantage," given that "Avondale merely had to concern itself with the prescription issue in state court, rather than the merits of Hill's claim." *Id.* at 6a-7a. The court therefore held that "an untimely state law claim cannot toll the statute of limitations for filing a LHWCA claim." *Id.* at 7a.[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Section 13(a) of the LHWCA, 33 U.S.C. 913(a), provides that a claim for compensation benefits under the LHWCA must be filed within one year of the injury or the date of the last payment that the employer makes without an award. The one-year time limitation does not begin to run, however, until the claimant becomes aware, or should have become aware, "of the

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[3] The court also denied petitioner's request for modification of the attorneys' fees and costs, which the ALJ, in a supplemental decision and order, had awarded based on petitioner's success in obtaining medical benefits. Pet. App. 7a-8a, 24a. Petitioner sought review of the ALJ's substantial reduction in the number of hours he had claimed as compensable under the Act's fee provision. *Id.* at 7a. Noting that the ALJ reduced the amount of attorneys' fees primarily because petitioner was not successful in his main claim for compensation benefits, the court affirmed the award of fees as within the discretionary authority of the ALJ. *Id.* at 7a- 8a. Petitioner has not raised that issue before this Court.

relationship between the injury or death and the employment." *Ibid.*; see *Marathon Oil Co.* v. *Lunsford*, 733 F.2d 1139, 1141 (5th Cir. 1984) (date of awareness is when claimant "know[s] (or should know) the true nature of his condition"). Section 13(d), 33 U.S.C. 913(d), sets forth a tolling provision:

> Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subsection (a) of this section shall begin to run only from the date of termination of such suit.

That provision does not apply here.

By its terms, Section 13(d)'s tolling provision applies where two requirements are met: (1) a claimant brings suit at law or in admiralty to recover damages for injury or death; and (2) recovery in that suit is denied because the parties were covered under the Longshore Act and the employer was insured under it. The first requirement is met where, as here, a claimant brings a state workers' compensation claim. 20 C.F.R. 702.222(b); see also *Hollinhead*, 571 F.2d at 273-274. But the second requirement clearly is not met in this case. The state court dismissed petitioner's state claim not because it concluded that the LHWCA provides the only available remedy,[4] but because petitioner's claim

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[4] Louisiana law contains a provision directing dismissal of cases fitting that description (see La. Rev. Stat. Ann. § 23:1035.2 (West 1998)), but the state court did not apply that provision to this case.

was untimely under state law. See Pet. App. 3a. Thus, Section 13(d) does not apply here, and the one-year limitations period set out in Section 13(a) was not tolled by the filing of petitioner's untimely state claim. Because petitioner's LHWCA claim was filed over eight years after petitioner's back condition was first diagnosed, the court of appeals correctly affirmed the denial of that claim as untimely.[5]

2. Petitioner contends (Pet. 6) that the court of appeals "violated Mr. Hill's due process and constitutional rights by fundamentally changing the law." He asserts first that the Fifth Circuit's decision in *Hollinhead* and the Board's decision in *Calloway* held that the filing of a state workers' compensation claim tolls the federal limitations period during the pendency of that claim without regard to the reason it is ultimately dismissed. He then argues that in departing from the holdings of those cases, the court of appeals "profoundly altered the law * * * and thereby severely prejudiced [petitioner]." *Ibid.* Petitioner further argues (Pet. 6-7) that because he filed his state claim within the federal one-year filing period set forth in Section 13(a), the court of appeals in effect held that "if the applicable state workers' compensation scheme provides a shorter time limitation for filing a claim than the LHWCA does, then the shorter period controls the LHWCA statute of limitations." That interpretation, petitioner asserts,

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[5] The court's discussion of the staleness of petitioner's claim and the unfairness to Avondale of permitting the LHWCA claim to proceed was unnecessary to its decision. We agree with petitioner (Pet. 8) that the record does not support a finding that Avondale would have been prejudiced by the delay had petitioner's LHWCA claim been allowed to proceed. But because that claim was untimely, the court's discussion of that point has no bearing on the correctness of the decision below.

will lead to inconsistent results depending upon the state in which the shipyard is located, and will sometimes, as in this case, result in the denial of benefits to a worker with an otherwise meritorious claim. Pet. 7. Petitioner's argument is unavailing.

Petitioner's reliance on *Hollinhead* and *Calloway* is misplaced. As the court of appeals in this case explained (Pet. App.-5a), the precise issue in *Hollinhead* was whether the filing of a state workers' compensation claim constitutes a claim for damages "at law or in admiralty," within the meaning of Section 13(d). See *Hollinhead*, 571 F.2d at 274. The Fifth Circuit in that case did not address Section 13(d)'s "grounds of dismissal" limitation at all. *Hollinhead* did, however, state that under Section 13(d), "the filing of a claim under the Mississippi Workmen's Compensation Act tolls" the LHWCA's one-year limitations period. *Id.* at 272. Seizing on that broad language, the Board in *Calloway* relied on *Hollinhead* for the proposition that the mere filing of a claim for damages tolls the statute of limitations, without regard to the grounds on which that claim is later dismissed. 16 Ben. Rev. Bd. Serv. at 177. That part of *Calloway*, however, was mere dicta: *Calloway* did not involve an untimely state claim, but rather a claim under the Jones Act (46 U.S.C. 688) that was dismissed because the claimant was not a statutory "seaman" and was therefore covered only under the LHWCA. See 16 Ben. Rev. Bd. Serv. at 176.[6] Moreover, the Board in *Calloway* simply ignored the text of Section 13(d), which expressly limits its tolling pro-

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[6] Cf. *Southwest Marine* v. *Gizoni*, 502 U.S. 81, 90 (1991) (in providing the tolling provision in Section 13(d), Congress anticipated that claimants would file LHWCA claims after unsuccessfully asserting "seaman" status under the Jones Act).

vision to situations in which the alternative claim was denied because the parties are covered and insured under the LHWCA. Petitioner cites no case supporting the proposition that he had a constitutional right to rely on the Board's inadequately reasoned dicta in *Calloway*, which had little basis in *Hollinhead* and simply ignored the plain language of Section 13(d).

Finally, far from making the appropriate limitations period depend on where the claim is filed, the decision below requires the consistent dismissal of any LHWCA claim that is untimely under Section 13(a) if it was preceded by a state workers' compensation claim that was dismissed as untimely. The denial of petitioner's claim because of its untimeliness is not a harsh or incongruous result, but rather the necessary result of Congress's specific decision to toll the statute of limitations only under certain limited conditions clearly specified by statute.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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